

STATEMENT OF RECORD

STATEMENT OF THE UNITED STATES

RECEIVED TREASURY DEPT.

NO. 29

THE LOUISVILLE TRUST COMPANY, APPELLANT.

THE LOUISVILLE NEW ALBANY AND CHICAGO RAIL
WAY COMPANY.

NO. 30

THE LOUISVILLE BANKING COMPANY, APPELLEE.

THE LOUISVILLE NEW ALBANY AND CHICAGO RAIL
WAY COMPANY.

STATE OF OHIO, COUNTY OF HAMILTON, ss.
I, JAMES M. HARRIS, Clerk of the Court, do hereby certify that the foregoing is a true and correct copy of the record in the above entitled case.

WITNESSED my hand and the seal of the Court at Cincinnati, Ohio, this 1st day of January, 1907.

JAMES M. HARRIS
Clerk of the Court

()

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. .

THE LOUISVILLE TRUST COMPANY, APPELLANT,

vs.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAIL-
WAY COMPANY.

No. .

THE LOUISVILLE BANKING COMPANY, APPELLANT,

vs.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAIL-
WAY COMPANY.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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ners as C. H. White & Co., and Salem H. Wales and Edward H. Wales, W. L. Stow, George B. Parsons and W. G. Reed, copartners as E. H. Wales & Co., and the Bank of North America of New York, a corporation organized and existing under the laws of New York, who are all citizens of the State of New York, and John B. Carson, Robert H. Hitt and George M. Pullman, who are all citizens of the State of Illinois, and says:

1. The Richmond, Nicholasville, Irvine & Beattyville Railroad Company, hereafter called the Beattyville Company, is a corporation organized under the laws of the State of Kentucky, with franchise and power to locate, construct and operate a line of railroad in said State extending from Versailles to Beattyville, and has the said railroad in process of construction.

2. The Ohio Valley Improvement & Contract Company, hereafter called the improvement company, is a corporation organized under the laws of the State of Kentucky, with franchise and authority to build and construct railways. On October 11, 1888, the said improvement company entered into a contract in writing with the said Beattyville Railroad Company, a copy of which is herewith filed marked Exhibit "A," and made part hereof, whereby the said improvement company undertook to build, construct and equip a line of railroad for said last-named railroad company, and receive in pay therefor about \$550,000 municipal bonds voted to such company and \$25,000 per mile of its first-mortgage bonds, and all of its capital stock, except about \$550,000. In pursuance thereof, the said improvement company entered upon the work of construction of said railroad and performed some portion of the earth-work and graduation prior to May, 1889. The entire amount of bonds proposed to be issued by such railroad company and secured by mortgage on its line is about \$2,250,000, and a like amount of capital stock. The defendant Richards is the president, and the defendant Cornwall is the secretary of the said improvement company, and the principal office thereof is maintained at Louisville, Kentucky.

3. The complainant is a corporation organized and formed under the laws of Indiana by consolidation in 1881, of a former corporation of Indiana, having the same corporate name with another corporation of Indiana then existing, called the Chicago & Indianapolis

Air Line Railway Company. Such articles of consolidation and merger were adopted in July, 1881, by the vote of the stockholders of both such original constituent companies, which articles and the laws of Indiana in that behalf, constitute the charter of the complainant. It is specially recited therein that the complainant is a corporation of the State of Indiana, and is subject to the general laws of that State, which vest, prescribe, ordain and limit whatever powers and franchises your orator possesses; and also regulates the manner in which such franchises and powers must be exercised by your orator, in order to be valid and binding. The complainant shows that the constitution of Indiana, and the laws under which it was organized specifically require that all corporations coming into existence, after the year 1851, should be sub-

ject to all such general laws as the legislature of such State might from time to time enact. All of the line of railroad owned by the complainant is situate within the State of Indiana. Its board of directors is composed of thirteen members. Its capital stock is \$5,000,000, divided into 50,000 shares, and all of the certificates issued by it and representing such shares, on their face recite that it is a corporation of such State and the complainant avers that it possesses no rightful corporate powers or franchises except such as have been granted to it by and according to the general laws and statutes of the State of Indiana prescribing the powers of railroads organized in such State, of all which public acts this court will take judicial notice, and that it is further prohibited from and incapable of exercising any power or making or performing any contract which is contrary to any of such public laws of the State of Indiana.

4. In May, 1889, and continuously to March 12th, 1890, the defendant Carson, was the chief executive officer of the complainant, exercising the chief active management of its general policy and operations, and he was also a member of the board of directors, and a trustee for your orator and its stockholders, and the defendants, Dowd, Hitt, Roosevelt, Fetter, Cook, Erhardt and Root, were also directors of your orator and like trustees. On or about the date last aforesaid, the said Richards, as president of said improvement company, being desirous of negotiating the bonds of said Beattyville railroad, and thus realize the necessary funds to carry on the work of constructing and equipment of said road, applied to said Carson to assist him in said work of negotiation, and the said Carson thereupon notified the defendant, Dowd, who was then president of your orator, that he had agreed to help the said Richards in such Beattyville enterprise. Shortly thereafter, with the active co-operation of

4 said Carson, the said Richards, acting for said improvement company, brought the subject of purchasing divers of the mortgage bonds issued and to be issued by said Beattyville Company to the attention of some of the directors of your orator, namely: to the defendants, Dowd, Carson, Roosevelt, Fetter, Root, Erhardt, Cook and Hitt, and an understanding was substantially arrived at between the said Richards and the said directors, or some of them, acting for themselves and others, that they and their friends would purchase from said improvement company one-half of the first-mortgage bonds of said Beattyville road at 90 cents on the dollar, and receive with such purchase a bonus of 51 per cent. of the entire issue of stock of said Beattyville Railroad Company. Thereupon on June 19th, 1889, to evidence the oral understanding thus reached between said Richards and some of said directors, the former submitted a proposition in writing, whereof a copy is herewith filed and made part hereof, marked "Exhibit B," whereby the said improvement company proposed to sell one-half of all such bonds at 90 cents on the dollar and accrued interest and transfer as a bonus to such purchasers 51 per cent. of all the stock of said Beattyville Railroad Company. At such time there was no agreement or understanding or negotiation of any kind that any of the

said railroad bonds were in any way to be indorsed or guaranteed by your orator, or that it was in any way to be involved in such enterprise. Thereupon as your orator is advised and believes, and so charges, the said directors and trustees, in substance informed the said Richards that his said written proposition was satisfactory and acceptable, and that they would proceed to subscribe for divers of such bonds, and endeavor to secure the balance to be subscribed for by their friends, if on investigation, the representations of the said Richards as to the affairs of said improvement company and its work of construction were confirmed. As your orator is advised and so charges, some of said directors did actually and in writing accept such proposal and subscribe for bonds in accordance therewith, and divers others orally agreed to make subscriptions thereto.

And your orator is advised and believes and so charges that said directors in execution of their understanding with said Richards did select a railroad expert, who, under their instructions and at the expense of said improvement company, visited Kentucky and inspected the proposed line of said Beattyville railroad, and the work done thereon, and made his report to said directors, and thereupon they informed said Richards that said report was

5 satisfactory, and gave directions to said Richards as to the preparation of the bonds and mortgage to carry out such written proposal, and continued to make effort for some time after such report in August, 1889, to secure additional subscriptions at the foot of said proposal of June 19, 1889, and to recommend the said project to divers parties, and the said scheme was never at any time abandoned. In all of such matters the directors of your orator, who are defendants, acted in their own individual interest, and not in behalf of your orator.

5. The defendants, Dowd and Carson, the then president and vice-president of your orator, and being interested in said enterprise as aforesaid, caused a special meeting of the board of directors of your orator to be called on October 8th, 1889, for the declared purpose of taking action with regard to the pending proposal of said Richards as to their purchase of divers of such Beattyville bonds.

The directors of your orator who were present at such special meeting were Dowd, Carson, Cook, Erhardt, Fetter, Hitt, Postlethwaite and Root, and of such number the defendant, Dowd, Carson, Root, Cook, Erhardt, were and had been engaged in the negotiations which had been carried on upon the basis of the written proposal of Richards, dated June 19th, 1889, and had been and were then interested in such schemes, and expected to become the owners of such bonds, and such parties had an oral understanding prior to such special meeting with said Richards that such original scheme should be altered, and that they would, as directors of your orator, vote "that such bonds should be guaranteed by it."

Without the vote and presence of such interested parties there was no lawful quorum of directors present to make any contract or in any way to bind your orator, and it avers that the defendants who were then directors had no power to act for or bind your orator

in a matter wherein they had a previous personal arrangement to subscribe at a discount for the said securities, after their votes had committed your orator to a general guarantee thereof.

At the said special meeting, with such directors as aforesaid being then present, and none others, a resolution was adopted ordering the execution of a pretended contract in writing which had been orally understood and agreed to between such Richards and such directors, and drawn up in writing prior to such meeting, whereby the guarantee of your orator for the entire principal and interest was to be placed on all such \$2,250,000 of first-mortgage bonds of said
6 Beattyville Railroad Company. A copy of such pretended contract as executed by the former president of your orator, and by him delivered to said Richards, is herewith annexed and made part hereof as "Exhibit C."

6. Shortly thereafter the said defendant directors in accordance with and execution of the oral understanding with said Richards as president of said improvement company, entered into prior to such meeting of October 19, 1889, that they would subscribe largely for such guaranteed bonds at 90 cents, proceeded to sign their names to a written subscription to take divers of such bonds as they had voted to be guaranteed, and the other defendants hereto, with full knowledge of all the facts aforesaid, and of the trust relations existing between your orator and its then directors, who were voting, agreeing and subscribing as aforesaid, did also subscribe for divers others of such bonds on a contract of subscription at the foot of the pretended contract of guarantee between your orator and said improvement company and the names of such subscribers, and the amount of bonds agreed to be taken by each such subscriber is hereto annexed and made part hereof as "Exhibit D." Each and every of such subscriptions to take and pay for certain of said bonds was incidental to and based upon the pretended contract aforesaid dated Oct. 9, 1889, and so voted by such directors in their own interest as aforesaid, and each and every of such subscriptions of the defendants were so made with full knowledge of the said pretended contract, and were executed prior to the actual illegal and unauthorized placing by the then officers of your orator of the pretended guarantee of your orator upon any of said bonds, and also long prior to the actual delivery of any of said bonds or guarantees therein to the said defendants, and your orator will to the court insist that each and every of the said defendants became interested in and contracted for the future delivery of such bonds and pretended guarantee, charged with full notice of the existence and nature of such paper-writing of October 9, 1889, and of the limited powers and authority of such directors of your orator, and of the fact that said directors were acting in their own interest, and contrary to their fiduciary duties in voting the guarantee of your orator to be placed on bonds of another company which they had arranged they would individually thereafter purchase at a discount and that none of the defendants hereto are *bona fide* holders of such pretended guarantees of your orator for value or in the usual course of business.

7. Thereafter the defendant Dowd, being then the president of your orator, illegally, and without right or power so to do caused to be placed upon each of the 585 of the bonds of the said Beattyville Company an endorsement in the words and figures set forth and recited in the paper-writing of October 9, 1889, and attached his signature as president, and caused the corporate seal of your orator to be affixed thereto, and the same to be attested by the secretary of your orator, and thereafter the defendant Dowd, on March 11, 1890, being the day before the annual meeting of your orator's stockholders, when he and his associate directors well knew that they would on the succeeding day cease to be such directors, or to have any official power to execute any further guarantee, again proceeded to place a pretended guarantee of the same kind upon 600 other mortgage bonds of said Beattyville Railroad Company and the said Dowd thereupon delivered all and singular the said \$1,185,000 mortgage bonds and the pretended guarantees of your orator thereon to the said Richards as president of the said improvement company, and illegally and without authority the said Dowd assumed as president and in behalf of your orator to receive from the said improvement company two certificates of capital stock in the said Beattyville railroad, being numbered 14 and 16 purporting to recite that your orator was entitled to 8,887 $\frac{1}{2}$ shares of such capital stock, amounting to \$888,750, face value. As your orator is advised and believes, and so charges, some of such railroad bonds bearing such pretended guarantees, have been paid for by and delivered to the several defendants in part performance of their aforesaid contract of subscription, and are still held by them, and some portion of the said bonds are in the present custody of the defendants, The Louisville Trust Company and The Bank of North America, unpaid for by such subscribers, and undelivered to them, but waiting future payment in accordance with the terms of the bond subscription aforesaid.

Your orator shows that there is now and has been ever since 1883, a public law enacted by the legislature of Indiana, which is obligatory upon your orator and its officers and shareholders, which statute expressly provides that no railroad corporation of such State shall have any power to endorse or guarantee the bonds of any railroad company of another State, except upon the petition of the holders of a majority in amount of all the stock of such guaranteeing corporation; and that such corporation shall not make any

8 guarantee or endorsement to any amount in excess of one-half of the capital stock of the corporation so guaranteeing.

Such law prescribes and limits the power of your orator and its officers with reference to any contract of guaranty or endorsement and all of the defendants were bound to take notice of the said public law, and the nature, extent and limitation of power for your orator to enter into any contract of guaranty, or for its officers to bind it by executing contracts.

Notwithstanding the existence and prohibition of such law the former officers of your orator adopted and executed the said paper-writing and placed such pretended endorsement and guaranty upon \$1,185,000 of said Beattyville bonds in open and deliberate viola-

tion of such statute, and without any petition, authority, vote or ratification of or from the holders of a majority in amount of the capital stock of your orator, and in fact without any petition, authority or power from any stockholders whatever, and without giving such stockholders any opportunity to consider or act upon such paper-writing or proposed endorsement before they were executed and delivered; all of which facts the defendants well knew when they made their subscriptions, or received such bonds and endorsements.

Your orator further shows that prior to the execution of such paper-writing and bond endorsement your orator had executed a contract with the Louisville Southern Railroad Company, dated December 10th, 1889, wherein and whereby your orator leased the said railroad, and guaranteed during such lease the bonds of said Louisville Southern Company to the amount of \$2,500,000, being the full half of the capital stock of your orator, and thereby under the said law your orator was expressly prohibited from any further or additional endorsement of any bonds of any corporation in Kentucky, and had no corporate power or capacity to make any contract to endorse the bonds of said Beattyville Company, or to place any valid guarantees upon such securities, or any of them, of all which facts the defendants had notice.

Your orator further shows that at the regular annual meeting of its stockholders called and held on March 12, 1890, and adjourned until March 22nd, 1890, the same being the first meeting of stockholders which convened after making the pretended contract with the said improvement company. Such matter was reported to the meeting and such stockholders by vote of over 32,000 shares adopted a resolution refusing to approve or authorize such reported contract of guaranty with such improvement company, but expressly rejected the same, and declared that your orator was not in
9 any way bound by such pretended contract, or the endorsements placed in pursuance thereof on the several bonds of the said Beattyville railroad.

Your orator therefore submits that the said paper-writing dated Oct. 9, 1889, and purporting to bind it to place its written and sealed guaranty for principal and interest on all or any of the bonds of said Beattyville Company and the actual written and sealed endorsements placed on the \$1,185,000 of such bonds, were contracts and agreements made by certain of your orator's directors, defendants hereto, without lawful authority and were constructively fraudulent by reason of the personal interest contracted for and acquired by such trustees, were contrary to the prohibition of the statutes of Indiana, and *ultra vires*, and without any corporate authority, and were wholly void, of all of which matters the said defendants had full notice.

The said Beattyville railroad is in an entirely incomplete condition. Only a portion of the grading is done. Some is scarcely begun. A large part of the expensive iron bridges is unfinished. Some of such work is not even contracted for. Only seven miles of rail have been laid. The whole road in its present condition is not

worth anything near the \$1,185,000 bonds already issued and is an utterly inadequate security for that sum. No part of the said — is being operated, so that no income can possibly be realized from the use or working of the mortgaged property out of which the semi-annual interest presently falling due on any of such bonds can be paid.

Your orator has caused due notice to be given the said improvement company of the action and vote of its shareholders as aforesaid, rejecting the said pretended contract and declaring the invalidity thereof, and demanding the cancellation and return of the same and of all and singular the unauthorized and void endorsements of your orator upon the said \$1,185,000 bonds of the said Beattyville Company, but the said improvement company and the said defendants have hitherto wholly failed, neglected, and refused to comply with such demand or to return or cancel the said paper-writing, or any of the endorsements upon said bonds, and your orator verily believes and charges that it is the intention of the said improvement company from time to time to call upon the defendants who are subscribers to the syndicate which has contracted to buy such bonds to pay the sums due according to subscription, and that thereupon the said Bank of North America and the Louisville Trust Company, who are the present custodians of a large amount of such securities, will proceed to receive such

10 payments and deliver such bonds bearing what purports to be the endorsement of your orator and that thereupon the defendants Dowd, Carson, Hitt, Fetter, Roosevelt, Erhardt, and Cook, and their other associates in such bond purchase, who were not directors, will proceed to sell, transfer and dispose of some or all of the railroad bonds bearing such pretended endorsement of your orator, to other persons and corporations to your orator unknown and not easy ascertainable, who will not have like clear and full notice of the invalidity, illegality, and constructed fraud aforesaid, which affects such endorsement in the hands of the defendants and which transferees and assigns will thereupon claim to be purchasers without notice of any such matters, and when the said Beattyville Company defaults upon the coupons as they fall due, which default as your orator believes and charges will certainly occur, the said third parties who may have then become the holders of such railroad bonds bearing such endorsement thereupon will claim that your orator is lawfully bounden for such interest, and will endeavor to enforce the payment of such coupons by reason of such illegal guaranty and will subject your orator to a multiplicity of suits in divers courts and to greatly enhanced costs and expense to assert and defend its lawful rights, and will thereby inflict upon it great and irreparable loss and damage.

Your orator claims and will insist that the said paper-writing dated Oct. 9, 1889, and each of the 1,185 pretended signed and sealed endorsements in the name of your orator upon the said railroad bonds are illegal, fraudulent, and void documents, which, upon their face, may purport to bind your orator, but are in fact no lawful obligation whatever and that none of the defendants have any right to

hold, dispose of or transfer, such pretended obligations of your orator, but that each and every of the defendants should be perpetually enjoined from claiming or enforcing any liability by reason thereof against your orator, or from enforcing or attempting to enforce in any court any liability by reason thereof against your orator or its property. Your orator has tendered back to said improvement company all the shares of stock of said Beattyville Railroad Company wrongfully "received" by your orator's former officers from it, which tender has been refused and complainant has such stock in its custody ready and willing to return the same.

Forasmuch as your orator has for such grievances no adequate remedy at law, but can only obtain relief in equity, it brings this suit, and the premises considered, prays that the defendants
 11 hereto be duly summoned to appear herein and answer the bill of your orator, but not under oath and be compelled to stand to and abide by such orders and decrees as the court may from time to time enter in this cause; that on final hearing the court will decree the said paper-writing dated Oct. 9th, 1889, and purporting to bind your orator to endorse all of the first-mortgage bonds of said Beattyville Railroad Company, and each of the 1,185 pretended endorsements so as aforesaid actually placed on such bonds to be illegal *ultra vires*, constructively fraudulent and wholly void and that the same and every thereof shall be delivered up to be cancelled and forever destroyed and each and every of the defendants perpetually enjoined from claiming any rights thereunder; that pending the entry of such final decree, this being an emergency, the court will forthwith enjoin and restrain each and every of the defendants from selling, transferring, pledging or encumbering in any way or parting with the possession of any of the said railroad bonds bearing thereon such pretended endorsement of your orator, and enjoined from bringing any suit thereon, until such time as the court may order each and all of such bonds having such endorsement to be deposited in the registry of the court to await the enrollment of a final decree cancelling all such illegal and void endorsements by your orator and that the court will grant such other and further relief as may seem just and necessary to fully establish and protect the equities of your orator.

LOUISVILLE, NEW ALBANY & CHICAGO
RAILWAY COMPANY.

HENRY CRAWFORD,
HELM & BRUCE, *Solicitors*.

UNITED STATES OF AMERICA, }
District of Kentucky. }

William L. Breyfogle on oath says: He is the president of the Louisville, New Albany & Chicago Railway Company, that he had read the foregoing bill and knows the contents thereof and that the matters therein set forth are true as he verily believes.

WM. L. BREYFOGLE.

Subscribed and sworn to before me this April 9, 1890.

SAM'L B. CRAIL,
Clerk U. S. Cir. Court, Ky. Dist.,
 By HENRY F. CASSIN, D. C.

- 12 The Exhibit "A," referred to in the foregoing bill of complaint, is in the words and figures as follows, to wit:

Agreement Between the Richmond, Nicholasville, Irvine & Beattyville Railroad Company and the Ohio Valley Improvement & Contract Company.

This agreement made the 11th day of October, 1888, by and between the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, of the first part, and the Ohio Valley Improvement & Contract Company of the second part, witnesseth:

That whereas the first party is authorized by its charter to locate, construct, equip and operate a railroad from a point in Woodford county, Kentucky, to a point on the Kentucky river at or near Beattyville, and to that end is authorized and empowered to issue its bonds secured by a mortgage upon its property and franchises to the amount of twenty-five thousand dollars (\$25,000) per mile, and is authorized and empowered to issue its capital stock for a like amount and the counties along the line, being so authorized have subscribed for five hundred and fifty thousand dollars (\$550,000) of said stock and agreed to issue their bonds therefor and the county of Woodford having agreed to deliver to the Woodford Railroad Company five thousand dollars (\$5,000) in county bonds when said company has caused a train of cars to be run from Versailles across Woodford county to a point on the Jessamine County line and the Woodford Railroad Company has agreed to assign said five thousand dollars (\$5,000) of bonds to the first party on certain conditions and the said first party being authorized to contract with any person or corporation for the construction and equipment of said road, and to make payment therefor in the bonds, capital stock and other securities of the company; and

Whereas the contract company is authorized by its charter to contract for such construction and equipment and to receive in payment therefor the securities of said railroad company; and

Whereas it is agreed that the contract company shall undertake the work of locating, constructing and equipping said railroad;

Now in consideration of the premises and of the natural covenants hereinafter indicated, to wit:

- First. Said railroad shall be constructed from a point at or near Versailles, Kentucky, by way of Nicholasville, Richmond and
 13 Irvine to a point within one-half mile of Beattyville or Proctor in Lee county; or from Richmond to its Lee County terminus by the most practicable route.

Second. Said road shall be a single-track railroad with such turn-outs and sidings as may be necessary in the judgment of the engi-

neer of the railroad company, not exceeding nine miles in the aggregate. The grades of the road shall not exceed ninety feet to the mile, or such other grade as may be agreed on by the parties hereto, nor shall the curves be greater than ten-degrees curves. Fills shall not be less than fourteen feet wide on the top, and shall have a slope from the base of not less than one and a half to one. The cuts shall not be less than fourteen feet in width at the bottom and the slopes not less than one-fifth to one in rock and one-half to one in earth. The road shall be laid with steel rails weighing not less than fifty-six pounds to the lineal yard and upon cross-ties not less in number than twenty-six hundred and forty to the mile, to be made of oak or of other timber approved by the engineer of the railroad company. The tunnels, if any be necessary, shall have a section of not less than nine cubic yards per lineal foot, and if necessary in the opinion of the engineer of the railroad company shall be suitably lined with timber. The construction company shall procure and cause to be conveyed to the railroad company the necessary right of way and grounds for stations or depot buildings, shall make all proper surveys and provide all necessary engineering and superintending and inspection of the work during its construction, and shall furnish the material for and construct all the necessary stone culverts, pipe drains, bridge and trestle masonry, bridge superstructure and trestles, cattle-guards and road crossings, and the entire work of construction, embracing material, workmanship and erection, shall be made under the direction and according to the plans and specifications, which shall be fixed by the chief engineer of the railroad company.

The contract company shall furnish all track material and lay the tracks, switches, turnouts, sidings, with the required number of cattle-guards and road crossings as detailed in the specifications, and shall ballast the track as may be required by the chief engineer of the railroad company. The contract company shall furnish the material for and construct two substantial well-built turn-tables fifty-four feet long with stone or brick pits, to be approved by the chief engineer of the railroad company, and at such points as he may designate. The contract company shall furnish the ma-

14 terial for and construct ready for use six water stations on the line of the road, of capacity not less than thirty thousand gallons each, with suitable power and wells or pools sufficient to maintain a sufficient supply of water and three fuel sheds and platforms to be located and constructed to the approval of the chief engineer of the railroad company.

The contract company shall furnish the material for and construct not less than twelve station buildings at such points as the railroad company may select and of such size and plan as may be designated by the chief engineer of the railroad company at an average cost of not more than one thousand dollars each.

The contract company shall also secure and cause to be conveyed to the railroad company sufficient land near the depot at the Lee County terminus for yard purposes and shall furnish the material for and erect a round-house and repair shop thereon in accordance

with the plans to be furnished by the chief engineer of the railroad company, the cost of the land and improvements not to exceed \$2,500,000.

Third. The contract Co. further agrees that until said work of construction above provided for shall have been completed, it will pay to said railroad Co. or for its account, such sums as may be necessary to pay all the salaries of its officers and to maintain its organization not exceeding in the aggregate \$10,000 per annum. The contract company also agrees to assume and pay the debts of the railroad company existing at this date not to exceed \$25,000.00.

Paragraph II. In payment for the work thus to be done and the expenditures to be made the railroad company agrees to assign and deliver to the contract company the following-named securities, to wit:

First. Of the Woodford County bonds five thousand dollars (\$5,000.00); of the Madison County bonds, two hundred and fifty thousand dollars (\$250,000.00); of the Estill County bonds, one hundred thousand dollars (\$100,000.00); of the Lee County bonds, fifty thousand dollars (\$50,000.00). The bonds of each of said counties to be turned over by the railroad company and received by the contract company when the railroad company becomes entitled to the same according to the terms and conditions under which the said counties made their respective subscriptions;

Second. Also, for each lineal mile of said road twenty-five thousand dollars (\$25,000.00) of the negotiable coupon bonds of the railroad company bearing six per cent. interest secured by a
15 mortgage or deed of trust, constituting a first lien upon its franchises and upon said line of railroad from its Woodford County terminus to its Lee County terminus, as above described, including the right of way, road-bed, cross-ties, track, sidings, switches, depots, water tanks, round-houses and its real estate and equipment of every description whatsoever, and upon all such property of the railroad company hereafter acquired excepting its branches.

Third. Also the subscriptions for the capital stock of the railroad company heretofore made by individuals amounting to — dollars, transferring to the contract company the right to collect the amounts remaining unpaid upon said subscriptions; and if said subscribers should direct that their certificates should be issued to and in the name of the contract company, the railroad company is to comply therewith.

Fourth. Also, for each lineal mile of said road twenty-five thousand dollars (\$25,000.00) of the paid-up capital stock of the railroad company after deducting the stock issued on the individual subscriptions mentioned in the next preceding clause and the five thousand five hundred and fifty shares subscribed for by the counties aforesaid.

Fifth. Also, all donations to and subscriptions for the capital stock of said railroad company hereafter made; and the railroad company is to execute the necessary papers for the transfer of such donations and subscriptions so as to vest the title in the name of the contract company.

Paragraph III. Payments for the work and expenditures above provided for shall be made in monthly installments, if called for by the contract company, and shall be for such proportion of the total contract price as the money expended, work done and material furnished or contracted for (when necessary to make payments therefor in advance of actual delivery) under this contract shall bear the total estimated expenditures and costs of the railroad and equipment when completed according to the terms of this contract, as the same may be fixed by the engineer of the railroad company.

Paragraph IV. As soon hereafter as practicable the railroad company shall as security for the performance of this contract issue twenty-five thousand dollars (25,000.00) of its first-mortgage bonds for each mile of its road to be constructed, and a like amount of its capital stock and make a deposit of the same, less the five thousand

16 five hundred and fifty shares of stock subscribed for by the aforesaid counties with the Louisville Safety Vault and Trust Company or such other persons as may be hereafter agreed upon as trustees pursuant to this agreement.

Paragraph V. In order to ascertain from time to time the amount of money coming due to the contract company under its agreement, it shall be the duty of the engineer in charge from month to month or when called upon, not oftener than once a month to certify in writing to the parties hereto what proportion the work done, material furnished or contracted for and money expended by the contract company under this agreement bears to the total expenditures and costs of the railroad and equipment when completed according to this contract as same may be estimated by said engineer and the amount payable thereof to said contract company; and thereupon the amount so certified shall become immediately payable by the railroad to the contract company. In the event of a change of engineers during the progress of the work the appointment of a new engineer shall be made by agreement between the parties hereto.

Paragraph VI. As the several installments of money shall become due to the contract company under this agreement as above provided, it shall be the duty of the railroad company to pay same in money or to give to the trustee an order for a delivery, to the contract company or its order, of the securities deposited with it as above provided equal in amount at their par value to the amount of such installment as fixed by the certificate of the engineer.

If the railroad company should pay any such installment in money, it may, upon depositing with the trustee the receipt of the contract company therefor, withdraw from the hands of the trustee an equal amount at par of the bonds and capital stock of the railroad company, such withdrawal to be in equal portions of each. If payments be made in securities instead of money, the contract company shall be entitled to receive *pro rata* payments in the stock and bonds of the railroad company after deducting the amounts paid in county bonds as provided in clause first of paragraph II of this contract.

The certificate of the engineer as above provided for approved by the president of the railroad company and with a direction from the latter to deliver securities to the amount called for by said certificate, shall be a sufficient authority to the trustee to make deliveries accordingly without further inquiry.

If the board of directors of the railroad company shall at any time by a resolution direct the trustee to deliver to the contract
17 company or its order any amount of the bonds or capital stock although in excess of the bonds above provided for the trustee shall make delivery accordingly.

A certified copy of such resolution attested by the president and secretary of the railroad company with the seal of the corporation attached shall be sufficient authority to the trustee to make delivery.

If the contract company shall negotiate a sale of the bonds and securities above mentioned or shall negotiate a loan on the faith thereof, which sale or loan shall be consented to by the railroad company then the railroad company will provide for a delivery of the securities under proper provisions and to such extent as may be necessary to enable the contract company to pay the amounts expended or incurred by it in the performance of this contract.

Paragraph VII. For the security of the trustee before any deliveries of stock or bonds shall be made by him, the parties hereto shall file with said trustee a statement giving the name of the engineer in charge of the work of construction, the names of the president and secretary of the railroad company and the names of the president, secretary and treasurer of the contract company and of any changes which may be made in either of these offices, notice in writing shall be given to the trustee by the parties hereto.

Paragraph VIII. If subcontractors be employed by the contract company to furnish material or to perform work herein provided for, it may assign to such subcontractors the right to receive any part of the money bonds or capital stock to which the contract company will become entitled by it subject to the conditions herein prescribed with relation to payments of money stock or bonds to said contract company.

Paragraph IX. The trustee shall receive for his services a compensation to be agreed upon between him and the parties hereto, the same to be paid by the contract company.

Paragraph X. The railroad company agrees that it will lend its assistance towards obtaining donations and further subscriptions to its securities as the opportunities may arise and transfer the same to the contract company, as provided in clause fifth of paragraph II of this agreement.

Paragraph XI. The Richmond, Nicholasville, Irvine & Beattyville Railroad Company and the Louisville Southern Railroad Company having entered into an agreement under which the
18 latter company under certain conditions is to take charge and maintain the road of the former and pay therefor 40 per cent. of the gross earnings; now the contract company agrees that if the said 40 per cent. is not sufficient to keep up the organi-

zation of the first party and pay the interest upon its first-mortgage bonds, then it, the contract company will pay said deficit during the construction of the road and for the first two semi-annual installments of interest maturing after its completion.

Wherever the word "engineer" is used in this agreement the chief engineer of the railroad company for the time being is meant.

Paragraph XII. Each party hereto agrees to make, execute and deliver any other or further assignments, transfers, certificates or other papers necessary or convenient to carry this agreement into full effect.

In witness whereof the Richmond, Nicholasville, Irvine & Beattyville Railroad Company has caused its corporate seal to be affixed and its corporate name to be signed hereto by its president, J. W. Stine; and the Ohio Valley Improvement and Contract Company has caused its corporate seal to be affixed and its corporate name to be signed hereto by its president.

RICHMOND, NICHOLASVILLE, IRVINE &
BEATTYVILLE R. R. CO.,

By J. W. STINE, *Pres't.*

OHIO VALLEY IMPROVEMENT & CON-
TRACT COMPANY,

By A. E. RICHARDS, *Pres't.*

[R. R. Seal.]

[Contract Co. Seal.]

Exhibit "B" also referred to in the bill of complaint herein is as follows:

Proposition.

The Ohio Valley Improvement and Contract Company, a corporation chartered by the legislature of Kentucky, is building the Richmond, Nicholasville, Irvine and Beattyville railroad. This road, which is about 90 miles long, is to be bonded for \$25,000 per mile and stocked for a like amount. Five hundred and fifty-five thousand dollars of the stock is to go to the counties. The remainder of the stock and all the bonds are to be paid to the Ohio Valley Improvement and Contract Company for building the road. These securities are to be turned over to the construction company, 19 as the work progresses, in payment for a proportionate amount of work actually done, upon the certificate of the chief engineer of the railroad company. The construction was begun March 1st, 1889, and the contract company will have earned its first \$500,000 in bonds about August.

This company proposes to sell one-half of the whole issue of bonds at 90 cts. on the dollar and accrued interest and to give to the purchasers as a bonus 51 per cent. of the entire issue of railroad stock. As each \$500,000 of the bonds (up to \$2,000,000) are earned by the contract company, the purchasers are to take and pay for one-half of the same and receive a proportionate amount of the 51 per cent. of stock. One-half of whatever amount there is earned in excess of the two million dollars of bonds, is to be taken and paid for upon the same terms when the road is completed.

The contract company, in consideration of said sale of bonds, obligates itself to build according to their existing contract, a first-class modern railroad in every particular; with proper sidings and outings, to lay the track with 60-lb. steel rails on 2,800 ties to the mile; to equip the road with four passenger, six freight and two switch engines, 400 coal cars, 75 box cars, 75 stock cars, 25 flat cars, two first-class and two second-class passenger cars, and two combination cars; and to make the bridges over the Kentucky river, Hickman creek, Marble creek, Miller's creek and Neal's branch, of iron. The whole property, including the right of way, depot grounds, road-bed and equipment, is to be turned over to the railroad company fully paid for and free of all liens, except that of the mortgage bonds.

If the net earnings of the railroad are not sufficient to pay the interest on the mortgage bonds, the contract company will pay the deficit during the construction of the road and for the first two semi-annual installments of interest maturing after its completion, and will deposit a sufficient amount of its securities, out of its last earnings, to guarantee the same.

June 19th, 1889.

OHIO VALLEY IMPROVEMENT &
CONTRACT CO.,

By A. E. RICHARDS, *Pres't.*

NEW YORK, *June 19th, 1889.*

We, the undersigned, agree to accept said proposition and to purchase the amount of said bonds set opposite our respective names, upon the terms therein set forth, provided a committee appointed by us to examine into the affairs of the company, the work of construction, etc., reports everything to be as represented by its president.

ELIHU ROOT,

One hundred thousand.

Exhibit "C" referred to is as follows:

This agreement, made between the Ohio Valley Improvement and Contract Company, a corporation organized and existing under the laws of the State of Kentucky, party of the first part, and the Louisville, New Albany and Chicago Railway Company, a corporation organized and existing under the laws of the States of Indiana and Kentucky, and hereinafter called the New Albany Company, party of the second part. Witnesseth:

First. The said construction company is engaged under a contract with the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, a corporation organized under the laws of the State of Kentucky, hereinafter called the Beattyville Company, in building the railroad of the said Beattyville Company.

The said railroad extends from a point at or near Versailles in Woodford county to Beattyville in Lee county and is about 90 miles in length.

The capital stock of said Beattyville Company amounts to \$25,000

per mile of said railroad, and first-mortgage bonds are to be issued by said Beattyville Company secured by mortgage upon the said railroad to the amount of \$25,000 per mile. \$555,000 of the said capital stock is to be issued or transferred to the counties along the lines of the road; the remainder of the stock and all the bonds are to be paid to the said construction company for building the road.

These securities are to be turned over to the construction company as the work progresses in payment for proportionate amounts of work actually done upon the certificate of the chief engineer of the said Beattyville Company.

A copy of the said construction contract is hereto annexed marked "A," and is hereby made a part of this agreement.

Second. All the bonds and certificates of stock required by the fourth paragraph of the said construction contract to be deposited with the Louisville Safety Vault & Trust Company have been so deposited in pursuance of the said paragraph.

Third. The said construction company hereby agrees to and with the said New Albany Company that in consideration of one dollar to it in hand paid and the covenants and agreements hereinafter contained, it will proceed to complete the said railroad from Versailles to Beattyville in accordance with the said construction contract, making it a first-class modern railway in every particular, with proper sidings and outings, to lay the track with sixty-pound steel rails on twenty-eight hundred ties to the mile, to equip the said road with four passenger, six freight and two switch engines, four hundred coal cars, one hundred box cars, twenty-five stock cars, fifty flat cars, two first-class and two second-class passenger cars and two combination cars, and to make the bridges over the Kentucky river, Hickman creek, Marble creek, Miller's creek and Neal's branch, of iron, and to turn over the whole property, including the right of way, depot grounds, road-bed and equipment to the said Beattyville Company fully paid for and free of all liens except that of the mortgage bonds.

Fourth. The said New Albany Company agrees to and with the said construction company that it will, from time to time, as the said first-mortgage bonds are earned by and delivered to the said construction company pursuant to the terms of their said construction contract, guarantee the payment by the said Beattyville Company of the principal and interest of the said bonds in manner and form following, that is to say, by endorsing upon each of said bonds a contract of guaranty as follows:

"For value received the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond the payment by the obligor thereon, of the principal and interest thereof in accordance with the tenor thereof.

In witness whereof the said railway company has caused its corporate name to be signed hereto by its president and its seal to be attached by its secretary."

Fifth. The evidence that the delivery of said bonds is in pursu-

ance of the terms of the said construction contract, that the said construction company are accordingly entitled to require such guaranty to be endorsed thereon, shall be the certificates of the chief engineer of the said New Albany Company.

22 Sixth. In consideration of the premises, the said construction company agrees to transfer and deliver to the said New Albany Company three-fourths of the entire capital stock of the said Beattyville Company, the said delivery to proceed *pari passu* with the guaranteeing of the said bonds by the said New Albany Company: \$3,000 at par of the said stock being delivered for each four thousand dollars of bonds guaranteed.

Seventh. The said construction company further agrees that if the net earnings of the said railroad are not sufficient to pay the interest on the mortgage bonds, the said construction company will pay the deficit during the construction of the railroad and for the first two semi-annual installments of interest maturing after its completion and will deposit a sufficient amount of its securities out of its last earnings under the said construction contract to secure such payment.

In witness whereof, the parties hereto have caused their corporate names to be subscribed by their respective presidents, and their corporate seals to be attached by their secretaries.

OHIO VALLEY IMPROVEMENT & CONSTRUCTION CO.,

Attest: By A. E. RICHARDS, *Pres't.*

[SEAL.] WM. CORNWALL, JR., *Sec'y.*

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,

Attest: By WM. DOWD, *President.*

[SEAL.] JOHN A. HILTON, *Ass't Sec'y.*

STATE OF NEW YORK, }
City and County of New York, } ss :

I, Charles Nettleton, a commissioner of the State of Kentucky, in and for the State of New York, residing in said city of New York, do hereby certify that this instrument of writing from Louisville, New Albany & Chicago Railway Company, was this day produced to me in said city, county and State of New York, by William Dowd and John A. Hilton, president and ass't secretary of the said Louisville, New Albany and Chicago Railway Co., — by William Dowd as president, and John A. Hilton, as ass't secretary, to be its act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal this 9th day of October, A. D. 1889.

[SEAL.]

CHARLES NETTLETON,
Commissioner for Kentucky in New York,
115 & 117 Broadway, N. Y. City.

23 STATE OF KENTUCKY, {
 Jefferson County. }

I, W. W. Hill, a notary public in and for the county of Jefferson, State of Kentucky, do hereby certify that this instrument of writing from the Ohio Valley Improvement & Contract Company was this day produced to me in said county and State by A. E. Richards, president, and Wm. Cornwall, Jr., secretary of the said Ohio Valley Improvement & Contract Company and was acknowledged by the said Ohio Valley Improvement & Contract Company by A. E. Richards as president and Wm. Cornwall, Jr., as secretary, to be its act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal this sixteenth day of October, A. D. 1889.

[SEAL.]

W. W. HILL,
 Notary Public, Jefferson County, Ky.

Extract from Minutes of the Meeting of the Board of Directors of the Ohio Valley Improvement & Contract Company Held October 14th, 1889.

The president laid before the board a contract between the Louisville, New Albany & Chicago R'y Co., and the Ohio Valley Improvement & Contract Company by which the former company agrees to guarantee the principal and interest of the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company in consideration of the transfer of seventy-five (75) per cent. of the stock of the latter railroad company, which contract was signed, acknowledged and delivered by the Louisville, New Albany & Chicago R'y Co., on October 9th, 1889. Thereupon on motion of Theodore Harris, seconded by Mr. Dennis Long, it was—

Resolved That said contract be approved and ratified and that the president be directed to sign this company's name to the same and the secretary to attest and attach the corporate seal, and that said officers be further directed to acknowledge and deliver said contract as the act and deed of this company, and that the same be spread in full in the minutes of this meeting, which contract is in words and figures as follows:

A true copy.

[SEAL.]

WM. CORNWALL, JR., Sec'y.

24 Exhibit "D" referred to in the bill of complaint is as follows:

List of Subscribers to Beattyville Bonds.

George M. Pullman.....	\$100,000
John B. Carson	100,000
J. M. Fetter.....	100,000
R. R. Hitt	100,000
Elihu Root	100,000

C. H. White & Co.....	\$79,000
E. H. Wales & Co.....	320,000
Wm. Dowd.....	70,000
D. H. Houghtaling ...	25,000
James Roosevelt.....	20,000
J. S. Brice.....	10,000
Carroll Bryce.....	6,000
D. G. Rollins.....	10,000
Joel B. Erhardt.....	20,000
H. H. Cook.....	25,000
Walter Howe.....	10,000
W. B. Leonard.....	10,000

\$1,125,000

And on the 9th day of April, 1890, came the complainants by Henry Crawford & Helm & Bruce its counsel and on its motion, it is ordered that the defendants, The Ohio Valley Improvement & Contract Company, The Richmond, Nicholasville, Irvine & Beattyville Railway Company, Louisville Safety Vault & Trust Company, Louisville Trust Company, Adolphus E. Richards, William Cornwall, Jr., James M. Fetter, Wm. Dowd, Elihu Root, Joel B. Erhardt, Henry H. Cook, Daniel G. Rollins, David H. Houghtaling, James Roosevelt, James S. Brice, Carroll Bryce, Walter Howe, William B. Leonard, & C. H. White & J. D. White, copartners as C. H. White & Co.; Salem H. Wales, Edward H. Wales, W. L. Stow, Geo. B. Parsons, W. G. Reed, The Bank of North America of New York, John B. Carson, Rob't H. Hitt & George M. Pullman, and every of them are restrained from in any way parting with the possession of any of the bonds or coupons of the Richmond, Nicholasville, Irvine & Beattyville Railway Company, having on them the endorsement — the Louisville, New Albany & Chicago Railway Company, and also restrained from sending said bonds and coupons or any of them out of the jurisdiction or in any way encumbering the same or changing the existing status until the further order of the court herein to be made upon a motion for an injunction on the 21st day of April, 1890, at Nashville, Tenn.

Upon which there issued the following restraining order :

Circuit Court of the United States, District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO RAILROAD CO. }

vs.

OHIO VALLEY IMPROVEMENT & CONTRACT CO. *et al.* }

WEDNESDAY, April 9th, 1890.

This day came the complainant by Henry Crawford and Helm & Bruce, its counsel, and on its motion, it is ordered that the defendants, The Ohio Valley Improvement and Contract Company; The Richmond, Nicholasville, Irvine & Beattyville Railway Company; The Louisville Safety Vault & Trust Company; The Louisville

Trust Company; Adolphus E. Richards; William Cornwall, Jr.; James M. Fetter; William Dowd; Elihu Root; Joel B. Erhardt; Henry H. Cook; Daniel G. Rollins; David H. Houghtaling; James Roosevelt; James S. Brice; Carroll Bryce; Walter Howe; William B. Leonard; C. H. White & J. D. White, copartners as C. H. White & Co.; Salem H. Wales, Edward H. Wales, W. L. Stow, George B. Parsons and W. G. Reed, copartners as E. H. Wales & Co.; The Bank of North America; John B. Carson; Robert H. Hitt and George M. Pullman, and every of them are restrained from in any way parting with the possession of any of the bonds or coupons of the Richmond, Nicholasville, Irvine & Beattyville Railway Company, having on them the endorsement of the Louisville, New Albany & Chicago Railway Company, and are also restrained from sending said bonds and coupons or any of them out of the jurisdiction, or in any way encumbering the same or changing the existing status until the further order of the court herein, to be made upon a motion for an injunction to be heard upon notice, on the 21st day of April, 1890, at Nashville, Tenn.

[SEAL.] Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America and the seal of our said circuit court in Louisville, this 11th day of April, 1890.

SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *D. C.*

26 And upon which restraining order the marshal made the following return:

Executed April 11th 1890 on the Louisville Safety Vault and Trust Company by delivering to H. V. Loving president of said company a true copy hereof, and on the Louisville Trust Company by delivering to H. V. Loving president of said company a true copy hereof, and on the Richmond, Nicholasville, Irvine & Beattyville Railway Company by delivering to J. W. Stine president of said company a true copy hereof and on J. M. Fetter by delivering to him a true copy hereof.

D. J. BURCHETT, *U. S. M.*,
By C. J. HOWES, *D. M.*

Executed April 12 on William Cornwall, Jr., by delivering to him a true copy hereof, also on Adolphus E. Richards, by delivering a true copy hereof; also on the Ohio Valley Improvement & Contract Company by delivering to Adolphus E. Richards president of said Co. a true copy hereof.

D. J. BURCHETT, *U. S. M.*,
By C. F. WEAVER, *D. M.*

And on the 23rd day of April, 1890, comes the complainant and moves the court upon notice given to grant a temporary injunction in accordance with the prayer of the bill, and came also the Nicholasville, Irvine & Beattyville Railroad Company, the Louisville Trust Company, the Louisville Safety Vault & Trust Company,

Adolphus E. Richards, William Cornwall, Jr., & James M. Fetter and file their plea to the jurisdiction and thereupon the said motion and said plea came on to be heard and were argued by counsel and taken under advisement by the court with liberty to the defendants to submit briefs within two weeks. The existing restraining order to remain in full force until further order of the court.

And on the 28th day of May, 1890, came the complainant and also such of the defendants as have heretofore appeared and filed their plea to the jurisdiction of the court herein, and the matters of such plea coming on to be heard the court overrules the said plea and refuses to dismiss this cause for want of jurisdiction and thereupon the motion of the complainant upon notice for a temporary injunction in accordance with the prayer of the bill coming on to

be heard and the court after hearing argument grants the
27 said motion and orders an injunction to issue pursuant to the prayer of the bill upon the complainant filing bond conditioned according to law in the penal sum of fifty thousand dollars with surety to be approved by the district judge or clerk of this court. It is further ordered that the defendants have until the July rules to plead, answer or demur to the bill herein.

And on the 31st day of May, 1890, there issued the following injunction:

Circuit Court of the United States for the District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY

vs.

THE OHIO VALLEY IMPROVEMENT & CONTRACT COMPANY *et al.*

The complainant, having executed bond, as required by the order of the court, in the penal sum of \$50,000, conditioned as required by law, and the sureties having been duly approved it is ordered that the defendants, The Ohio Valley Improvement & Contract Company, The Richmond, Nicholasville, Irvine & Beattyville Railway Company, The Louisville Safety Vault & Trust Company and The Louisville Trust Company, Adolphus E. Richards, William Cornwall, Jr., James M. Fetter, William Dowd, Elihu Root, Joel B. Erhardt, Henry H. Cook, Daniel G. Rollings, David H. Houghtaling, James Roosevelt, James S. Brice, Carroll Bryce, Walter Howe, William B. Leonard, C. H. White and J. D. White, partners as C. H. White & Co.; Salem H. Wales and Edward H. Wales, W. L. Stow, George B. Parsons and W. G. Reed, partners as E. H. Wales & Co.; The Bank of North America, John B. Carson, Robert H. Hitt, and George M. Pullman and each and every of them be and they are hereby enjoined and restrained, until the further order of the court, from claiming any rights under the alleged contract of paper-writing dated May 9th, 1889, between the complainant and the defendant, The Ohio Valley Improvement & Contract Company, purporting to bind the complainant to endorse all of the first-mortgage bonds of the Richmond, Nicholasville, Irvine & Beattyville Railway Company, and the said

defendants, and every of them, are enjoined and restrained from selling, transferring, pledging or encumbering in any way or parting with the possession of any of said railroad bonds or coupons bearing thereon such pretended endorsement of the complainant,

28 The Louisville, New Albany & Chicago Railway Company, and the said defendants and every of them are enjoined and restrained from bringing any suit on said endorsed bonds or any of them, or sending said bonds or any of them out of the jurisdiction of this court.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the [SEAL.] seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 31st day of May, A. D. 1890, and in the 114th year of our Independence.

SAM'L B. CRAIL,

C. C. C., K. D.,

By HENRY F. CASSIN,

His Deputy.

Upon which the marshal made the following return: Executed May 31st, 1890, on the Louisville Safety Vault and Trust Company and the Louisville Trust Company by delivering to H. V. Loving, president of said companies, two copies of this injunction, and June 2, 1890, on the Ohio Valley Improvement and Contract Company by delivering to Adolphus E. Richards, president of said company, a true copy hereof, and on the Richmond, Nicholasville, Irvine & Beattyville Railway Company by delivering to J. W. Stine, president of said company, a true copy hereof. And on Adolphus E. Richards, William Cornwall, Jr., and James M. Fetter by delivering to each of them a true copy hereof.

D. J. BURCHETT, *U. S. M.,*

By C. J. HOWES, *D. M.*

29 And at a term of our court held for its February term, 1891, to wit, on the 16th day of February, 1891, came the parties hereto and plaintiff filed a copy of the articles of incorporation of the Louisville, New Albany & Chicago Railway Company dated December 31st, 1872, and also a copy of the articles of consolidation between the Louisville, New Albany & Chicago Railway Company and the Chicago and Indianapolis Air Line Railway Company dated May 5th, 1891, and by agreement it is ordered that said copies be read on the hearing of this action though not certified.

The parties also filed herein a written agreement and also filed the affidavit of — Hilton referred to in said agreement.

The articles of incorporation above referred to are as follows:

CHAPTER 858.

An act to incorporate the New Albany and Chicago Railway Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky.

SECTION ONE. That the Louisville, New Albany and Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations, and authority to operate a railroad.

SECTION TWO. That the Louisville, New Albany and Chicago Railway Company is hereby authorized to purchase or lease, 30 for depot purposes in the city of Louisville or county of Jefferson, such real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machine shops, and for all switches or turnouts necessary to reach the same and it is also authorized to connect with any railroad or bridge now operated or used or which may be hereafter operated or used in said county of Jefferson, and may build any such connecting lines, or lease or operate the same, and for all said purposes shall have the right to condemn all property required for the carrying out of the objects herein named, and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights and franchises.

SECTION THREE. That said corporation shall have the power and right to condemn all property in the city of Louisville or county of Jefferson, in this State, which may be deemed by it to be necessary for the purposes set out in this act; and that the proceedings for that purpose shall be instituted either in the Jefferson court of common pleas or the Louisville chancery court, and shall be carried on as nearly as may be, as actions at law by ordinary proceedings. Warning orders against non-residents, absent defendants, or unknown owners of property must be published three times in one of the daily newspapers published in said city of Louisville, State of Kentucky, the last publication at least ten days before the trial. The owners of distinct parcels of one contiguous tract may all be included in one proceeding, or any one or more of them holding contiguous tracts may be proceeded against in a separate action. The courts shall make all such rules, orders, and judgments as will secure a fair trial by an impartial jury of said city or country, and shall give precedence upon its docket as soon as the parties are before the court and the issue made up. The jurors shall be sworn truly to ascertain and determine by their verdict the amount of compensation each owner will be entitled to if his land or property described in the petition be condemned. The court in which these proceedings are brought shall have power to assign a day for the trial of the case as soon as the petition is filed. Upon the return of the verdict, the court shall render judgment vesting title to the property described in the proceedings in said corporation, said judg-

ment to take effect upon the payment into court by said corporation of the amount of money named in the verdict within thirty days after the rendition of said judgment; and should said corporation fail to so pay said money within said time, the said proceedings shall be dismissed without prejudice to other and subsequent proceedings.

31 SECTION FOUR. This act shall take effect from and after its passage.

T. J. BUSH,
Pro Tem. Speaker House of Representatives.
 JAMES E. CANTRILL,
Speaker of Senate.

Approved April 8th, 1880.

LUKE P. BLACKBURN.

By the governor:
 SAM'L B. CHURCHILL,
Secretary of State.

The articles of consolidation referred to in order of the 16th of February, 1891, are as follows:

Articles of Consolidation Between the Louisville, New Albany and Chicago Railway Company and the Chicago and Indianapolis Air Line Railway Company, Dated May 5th, 1881.

This agreement made this fifth day of May, A. D., 1881, between the Louisville, New Albany and Chicago Railway Company, as party of the first part, and the Chicago and Indianapolis Air Line Railway Company, as party of the second part:

Witnesseth: That whereas the party of the first part is a corporation existing under the laws of the State of Indiana with a share capital of \$3,000,000 and has constructed, owns and operates a line of railroad extending from the city of New Albany, Floyd county, Indiana, to Michigan City, La Porte county, in the same State, and

Whereas, the said party of the second part is a consolidated corporation, organized and existing under the laws of the States of Indiana and Illinois with a share capital of \$2,000,000 and has in process of construction a line of railway extending from the city of Indianapolis, Marion county, Indiana, to a connection with a railroad at or near Glenwood, Cook county, Illinois, so as to secure a connection with and entrance to the city of Chicago, Illinois, and

Whereas, the lines of railroad so described as aforesaid and belonging respectively to said parties of the first and second parts intersect and connect with each other at Bradford, White county, Indiana, so as to allow the free interchange of traffic between each other, and if joined, united and consolidated, would form a line of railroad connected from the cities of New Albany and Indianapolis, Indiana, to the city of Chicago, in the State of Illinois, and

32 Whereas, the union, merger and consolidation of said two lines of railroad appurtenances and franchises so as to form a corporation under one ownership and control, will enable the said

properties to be operated with more efficiency and economy, and with greater benefit to the respective shareholders and to the public, and

Whereas, the said parties hereto have full powers and authority under the laws of the States of Illinois and Indiana to consolidate their stocks and properties, and it is desired to effect such union, merger and consolidation between the said parties of the first and second parts upon such equitable terms and basis as would recognize the rights of the shareholders in said two corporations and equalize the dissimilar values of the two different lines of railroads and properties:

Now, therefore, in consideration of the premises and to effectuate the purpose aforesaid, the said parties of the first and second parts do hereby mutually covenant and agree with each other as follows, viz:

Article 1. The said parties of the first and second parts do hereby subject to the approval of their respective boards of directors and shareholders as hereinafter specified, severally agree to and with each other, to unite, merge and consolidate the said two corporations and all their railroads, properties, stock and franchises of every kind so as to create and form a consolidated corporation, to be called and known as the "Louisville, New Albany and Chicago Railway Company" on the terms and conditions hereinafter specified, that is to say,

Article 2. By this agreement and act of consolidation, when ratified and approved by the respective boards of directors and the shareholders of both parties hereto, the said parties of the first and second parts, convey, transfer to and vest in the consolidated corporation, so created, all and singular the respective lines of railroads, with all their lands, rights of way, leases, leasehold rights, equipments, machinery, contract rights, licenses, stations, moneys, books, papers, records, choses in action, rights, franchises, privileges and immunities and all property of every kind, real, personal or mixed and whether held in possession, reversion or remainder, and whereversituate. And the said parties hereto do agree and declare, that all and singular such railroads, properties and franchises shall from the date of the consummation of this consolidation, thenceforth be held, owned, managed, enjoyed and aliened by the said consolidated corporation hereby created, and to and for its own use,

benefit and behoof, to all intents and purposes, as fully and
33 completely as the said respective parties hereto can do or do now own, hold, use, possess, enjoy or control the same, and the parties hereto do respectively covenant and agree each with the other, that they will execute, seal, acknowledge and deliver to such consolidated corporation, any and all such further or other deeds, assignments or writings as may be necessary or proper to carry out the true intent and meaning of this agreement, and by way of further assurance of title to said property, assets and franchises or any of them.

Article 3. The said consolidated corporation hereby created shall be vested with all the rights, privileges, immunities and franchises

which usually pertain to railroad corporations under the laws of the respective States of Illinois and Indiana, wherein the lines of its railroad are situate, and shall also be vested with all and singular the rights, powers, privileges, immunities, capacities and franchises which before the execution of these articles was lawfully possessed or exercised by either of the parties hereto.

Article 4. The capital stock of the consolidated corporation hereby created shall be, until changed by some manner according to law five million dollars (\$5,000,000) being the sum total of the existing share capital of the first and second parties hereto and it shall be divided into fifty thousand shares of one hundred dollars per value each, and each holder of the stock in either of the parties hereto shall from the date of the legal consummation of this consolidation be held and considered a shareholder in the consolidated corporation which is created by these presents, in the proportion, to the extent and in the manner in the next article stated.

Article 5. In order to equalize the different values of the respective stocks of the parties of the first and second parts it is agreed, that the stockholders of the party of the first part shall be entitled to receive for their entire interest legal and equitable in the capital stock of the party of the first part, \$3,450,000 of the capital stock of the consolidated corporation being 34,500 shares of the par value of one hundred dollars each, deliverable on the surrender of the stock certificates of the said party of the first part now outstanding to be distributed among them in proportion to the stock held by them in the party of the first part and surrendered by them respectively upon the consolidation.

And likewise it is agreed that the stockholders of the party of the second part, or such person or persons as they authorize to receive them shall be entitled to receive for the entire interest
34 of said stockholders, legal and equitable, in the capital stock of the consolidated company, \$1,550,000 of the capital stock of said consolidated corporation, being 15,500 shares of the par value of one hundred dollars each, deliverable on the surrender of any and all stock certificates of the party of the second part now outstanding.

The certificates of the shares of the capital stock of the consolidated corporation so created shall be issued to the persons entitled thereto on demand and the surrender by them of the certificates held by them in the capital stock of the parties hereto in the proposition as above recited in this article.

Article 6. It is further distinctly agreed that for the purpose of carrying out the provisions of the pending construction contract whereby the line of railroad of the party of the second part is being built the said consolidated corporation as soon as it comes into being, shall issue its coupons bonds to the amount of two millions three hundred thousand dollars, bearing six per cent. interest payable semi-annually both principal and interest to be payable in gold coin of the United States of the present standard of weight and fineness, and to be secured by a mortgage to some proper trustee, or trustees, which shall be a first lien on the railroad from Indianapolis

to its Chicago terminus, and the equipment and appurtenances thereto belonging.

Of such bonds one million eight hundred and fifty thousand dollars are to be used in payment, under such construction contract and four hundred and fifty thousand dollars of such bonds, for the equipment for said Chicago and Indianapolis division and to the general purposes of said consolidated corporation.

Article 7. The business and affairs of the consolidated corporation hereby created shall be managed by a board of directors to be annually elected according to law on such date, and at such place as may be appointed by the by-laws of the consolidated company, and until the first election the board of directors of the consolidated corporation shall be composed of the present board of directors of the party of the first part.

Article 8. The present by-laws and the present common or corporate seal of the party of the first part shall be until changed according to law, the by-laws and corporate seal of the consolidated corporation hereby created.

Article 9. The principal place of business and the general office of the consolidated corporation shall be established in the city of Louisville, Kentucky, and the books, vouchers, instruments of title, records, cash, evidences of debt, contracts and all papers and
35 documents pertaining to the property or business of either of the parties hereto shall at once be delivered to the proper officer or agent of the consolidated corporation, and the said books, records and papers shall be deemed and taken as far as necessary or desired as the records, and books of said consolidated corporation.

Article 10. These articles of consolidation shall become consummated and go into effect, and the consolidated corporation so created shall come into existence only after the due and legal ratification of these presents by the respective boards of directors and the shareholders of the parties hereto. It is hereby expressly agreed that the above and foregoing instrument is to be submitted as soon as the same can legally and properly be done to the respective boards of directors and the shareholders of the parties hereto, and if thereupon these presents are not ratified the same are to become void and of no effect.

In witness whereof we have hereunto set our hands the day and year first above written.

[Corporate Seal.]

LOUISVILLE, NEW ALBANY & CHICAGO
RAILWAY COMPANY,

By R. S. VEACH, *President*.

Attest: W. H. LEWIS, *Sec.*

[Corporate Seal.]

CHICAGO & INDIANAPOLIS AIR LINE
RAILWAY COMPANY,

By P. M. KENT, *President*.

Attest: W. A. STARIN, *Sec.*

STATE OF NEW YORK, }
City and County of New York, } ss:

I, Richard S. Veach, do hereby certify that I am the president of the Louisville, New Albany and Chicago Railway Company, and that the articles of consolidation between the above-named corporation and the Chicago and Indianapolis Air Line Railway Company of which the foregoing and annexed paper is a full and true copy were approved by the board of directors of said Louisville, New Albany and Chicago Railway Company on the 7th day of June, 1881, who at a meeting on that day recommended to the stockholders of said last-named company to adopt the said consolidation and at the same time directed the president to call a meeting of the stockholders to be held not less than thirty days after due notice according to the laws of Indiana.

36 And I do further certify that at a meeting of the stockholders of said Louisville, New Albany and Chicago Railway Company duly called and held on the 18th day of July, 1881, the said articles of consolidation were duly approved by the affirmative vote of twenty-two thousand and seventeen shares being all the shares represented at said meeting and constituting more than two-thirds of all the stock of said corporation, and by the resolution and proceedings of said stockholders' meeting the board of directors were authorized to carry out and consummate the said consolidation.

And I do further certify that at a meeting of the directors of the said Louisville, New Albany and Chicago Railway Co. held on the 19th day of July, 1881, the said directors authorized and directed me as president of said last-named company to consummate the said consolidation according to the terms of the said articles of consolidation annexed hereto as aforesaid.

Wherefore I do further certify and declare by virtue of the said approval and ratification of the said articles of consolidation and by virtue of the authority in me vested as aforesaid, the said articles of consolidation of which the said annexed and foregoing paper is a full and true copy has become fully approved and consummated and has gone into full effect and is the true contract of consolidation.

R. S. VEACH.

Subscribed and sworn to before me this sixth day of August, A. D. 1881.

Witness my hand and seal of office.

[SEAL.]

S. G. LEATHEN,
Notary Public, New York Co.

STATE OF ILLINOIS, }
Cook County, } ss:

I, Phineas M. Kent, do hereby certify that I am president of the Chicago and Indianapolis Air Line Railway Company, and that the within and foregoing articles of consolidation were duly and legally

ratified at a special meeting of the stockholders of said corporation duly called and held at Chicago, Ill., on May 11, 1881, by the affirmative vote of 20,000 shares being all the stock of said corporation.

Witness my hand and the seal of said corporation this 8th day of August, A. D. 1881.

[SEAL.]

PHINEAS M. KENT.

Attest: WM. A. STARIN, *Secretary*.

Subscribed and sworn to before me a notary public in and for said State and county, August 8, 1881.

Witness my hand and official seal.

[SEAL.]

WM. A. STARIN,
Notary Public.

37 UNITED STATES OF AMERICA, } ss:
State of Illinois,

OFFICE OF SECRETARY.

I, Henry D. Dement, secretary of state of Illinois, do hereby certify that the foregoing articles of consolidation between the Louisville, New Albany & Chicago Railway Company, and the Chicago and Indianapolis Air Line Railway Company, were filed for record in this office August 10th, A. D. 1881, at 9.15 o'clock a. m., and duly recorded in Book "5" Railroad Incorporations at page 42.

In witness whereof, I hereto set my hand and affix the great seal of State, at the city of Springfield, this 11th day of August, A. D. 1881.

[SEAL.]

HENRY D. DEMENT,
Secretary of State.

Certificate.

STATE OF INDIANA, } ss:
Office of the Secretary of State,

I, E. R. Hawn, secretary of state of the State of Indiana do hereby certify that the articles of consolidation between the Louisville, New Albany and Chicago Railway Company and the Chicago and Indianapolis Air Line Railway Company were filed in the office of the secretary of state of the State of Indiana on the 10th day of August, A. D. 1881, as appears from date of filing thereon endorsed and now remaining on file in this office, and were also recorded in Railroad Record No. 1 page 215 to 220 inclusive.

In witness whereof, I have hereunto set my hand and affixed the seal of the State of Indiana, at the city of Indianapolis, this 10th day of August, A. D. 1881.

E. R. HAWN,
Secretary of State.

STATE OF ILLINOIS, } ss:
Cook County, }

I, W. H. Lewis, secretary and treasurer of the Louisville, New Albany & Chicago Railway Company, do hereby certify that the above and foregoing is a full, true and correct copy of the original instrument of articles of consolidation between the said Louisville, New Albany & Chicago Railway Company and the Chicago and Indianapolis Air Line Railway Company dated the fifth day of May, 1881, with certificate of the president of the Louisville, New Albany and

38 Chicago Railway Company that the same was approved by the board of directors and stockholders of the last-named company, and with certificate of the president of the Chicago and Indianapolis Air Line Railway Company that the same was approved by the stockholders of said last-named company, and also certificates of the secretary of the State of Indiana and the secretary of the State of Illinois, showing the filing and recording of the same in their respective offices.

Witness my hand and the official seal of the Louisville, New Albany & Chicago Railway Company, hereto, this 21st day of May, A. D. 1894.

[SEAL.]

W. H. LEWIS, *Secretary.*

The written agreement referred to is as follows:

UNITED STATES OF AMERICA, {
District of Kentucky. }

United States Circuit Court for the Dist. of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY CO., Plaintiffs, }
vs. }
THE OHIO VALLEY IMPROVEMENT & CONTRACT CO. *et al.*, De- }
fendants. }

It is agreed by the parties hereto—

1st. That none of the stockholders of the Louisville, New Albany & Chicago Railway Company ever petitioned the directors of said company to execute the endorsement placed upon the bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Company, guaranteeing the payment of the principal and interest of the bonds of said railway company, and that said endorsement was placed on said bonds on the authority of the directors of said company alone, and not by authority of the stockholders of said company or any of them in the manner pointed out by section 3951 A, B, & C of the statutes of Indiana.

2nd. It is further agreed that the affidavits with the exhibits therewith heretofore read by either party on preliminary motion shall be deemed and treated as depositions and competent evidence on the final hearing of this case.

HELM & BRUCE,
For Complainant.
BULLITT & SHEILD,
For Defendant.

39 And on the 28th day of January, 1893, comes the complainant by its solicitors and on leave of court first had and obtained files its supplemental bill herein duly verified by affidavit making new parties to this cause and praying the issue of a temporary restraining order until such time as a motion for an injunction can be heard upon notice.

It is thereupon ordered that the following parties named in said supplemental bill be made defendants in this cause and that process issue against them to appear herein, viz: Vernon D. Price, Bennett H. Young, John W. Stine, Louisville Trust Company as assignee of Cornwall & Bro., Louisville Trust Company as assignee of William Cornwall, Jr., Thomas W. Bullitt, Theodore Harris, Louisville Banking Company, Dennis Long, Columbia Finance and Trust Company and Bernard Hollman.

And upon the statements in the verified supplemental bill contained and on motion of complainant's solicitors, it is by the court ordered that until further order in the premises the defendants, Vernon D. Price, Bennett H. Young, John W. Stine, Louisville Trust Company and Louisville Trust Company as assignee of William Cornwall, Jr., Louisville Trust Company as assignee of Cornwall & Bro., Thomas W. Bullitt, Theodore Harris, Louisville Banking Company, Dennis Long, Columbia Finance and Trust Company; Columbia Finance and Trust Company, trustee, and Bernard Hollman be and they are hereby enjoined and restrained from selling, transferring, pledging or encumbering in any way or parting with the possession of any of the bonds of the Richmond, Nicholasville, Irvine and Beattyville Railway Company and the coupons thereto belonging purporting to be guaranteed by the complainant, and they are also enjoined from sending any of such bonds or coupons out of the jurisdiction of this court or bringing or further prosecuting any suit against the complainant to recover on any such bonds or coupons.

And upon which order the marshal made the following return:

Executed Jan'y 31, 1893, on Vernon D. Price, Bennett H. Young John W. Stine, Thomas W. Bullitt, Theodore Harris, Dennis Long and Bernard Hollman by delivering to each of them a true copy hereof; and on the Louisville Trust Co. by delivering to H. V. Loving, president of said Co. a true copy hereof; and on the Louisville Trust Co. as assignee of Wm. Cornwall & Bro. by delivering to H. V. Loving, president of said Co. a true copy hereof; and on the Louisville Trust Company as assignee of Wm. Cornwall, Jr., by delivering to H. V. Loving, president of said Co. a true copy hereof; 40 and on the Louisville Banking Co. by delivering to Theodore Harris, president of said Co. a true copy hereof; and on the Columbia Finance and Trust Company by delivering to Attila Cox, president of said Co., a true copy hereof; and on the Columbia Finance and Trust Co. as trustee, by delivering to Attila Cox, president of said Co., a true copy hereof.

D. J. BURCHETT, U. S. M.,
By C. J. HOWES, D. M.

The supplemental bill referred to is as follows:

United States Circuit Court, District of Kentucky.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY	} In Equity.
<i>vs.</i>	
OHIO VALLEY IMPROVEMENT & CONTRACT COMPANY and Others.	

*The Supplemental Bill of the said Louisville, New Albany and Chicago
Railway Company.*

The complainant by way of supplement shows to the court:

That heretofore to wit, on April 9th, 1890, it filed its original bill in this court against the above-named Ohio Valley Improvement & Contract Company, The Richmond, Nicholasville, Irvine & Beattyville Railroad Company, The Louisville Safety Vault & Trust Company, The Louisville Trust Company, Adolphus E. Richards, William Cornwall, Jr., James M. Fetter and divers other defendants, wherein and whereby it alleged that it was a corporation organized under the laws of the State of Indiana and owned and operated a line of railroad between Louisville in the State of Kentucky and Chicago in the State of Illinois and further charged that its directors and officers had without any authority from its stockholders and contrary to law about May 9, 1889, executed a written contract with the said Ohio Valley Improvement & Contract Company which purported to bind the complainant to guarantee the payment of the principal and interest of \$2,375,000 of the first-mortgage bonds of the Richmond, Nicholasville, Irvine & Beattyville Railway Company and also that the officers of complainant had without authority and unlawfully actually endorsed the absolute guarantee of

41 the complainant upon \$1,185,000 of such bonds and that the defendants owned and held in possession divers of such bonds bearing what purported to be the endorsement and guarantee of the complainant, and it thereupon prayed for the cancellation of such unlawful contract and guarantees and pending final hearing that an injunction might be granted by the court restraining each of the defendants from suing on such endorsements or selling, encumbering or parting with the possession of any of such guaranteed bonds or sending them out of the jurisdiction and for other relief.

Thereafter process to appear and answer in the premises was duly served upon each and every of the defendants whose names have been hereinbefore at large recited and an answer has been filed in substance admitting the material allegations of the complainant's bill, and replication has been filed to such answer.

On the filing of such bill, a temporary restraining order was granted against disposing of or encumbering any of the said guaranteed bonds or sending the same out of the jurisdiction and afterwards on notice and full hearing on May 28, 1890, an injunction was granted to like effect which order of court is still in full force.

Thereafter a stipulation in writing was filed in the cause wherein

it is admitted that the guarantees on such bonds purporting to bind the complainant were executed by its then officers without any vote of or authority from the stockholders of complainant.

On October 3, 1891, a decree was entered in said cause cancelling the guarantee of complainant on the bonds of said Richmond, Irvine & Beattyville Railway Company numbered from 601 to 675 both inclusive and such bonds were produced in open court and stamped in accordance with such decree of cancellation, which decree is in full force and effect.

On November 4, 1891, a like decree of cancellation was entered herein cancelling such guarantees upon the bonds of said issue numbered 676 to 767, both inclusive, and such bonds were produced in open court and stamped in accordance with such decree of cancellation which decree is still in full force and effect.

Since the institution of this action the work of construction on said Richmond, Nicholasville, Irvine & Beattyville railway has wholly ceased and such company has become hopelessly indebted and insolvent and the Central Trust Company the trustee in said first mortgage has brought suit in this court against said railway company to foreclose the said mortgage and sell the said railway and for many months all the said mortgaged property has been in the possession of and operated by John MacLeod as the receiver of this court.

On November 13, 1891, in accordance with and execution of the conditions in the said trust deed contained the holders and owners of 2,261 bonds secured thereby being more than a majority thereof, served a written notice by them signed upon the said Central Trust Company declaring that for default in payment of an installment of semi-annual interest they elected to declare the entire principal of said \$2,375,000 of mortgage bonds issued by said Richmond, Nicholasville, Irvine & Beattyville Railway Company to be at once due and payable and ordered the said trust company to proceed to enforce the collection of the principal and interest of all such bonds by the foreclosure of said mortgage and sale of the property.

Complainant files herewith a certified copy of the said bondholders' declaration as Exhibit A, and prays that the same may be taken as a part of this supplemental bill.

Complainant shows that by the publication of the deposition of a witness taken for use in such foreclosure proceeding which deposition was attached thereto the original declaration of such bondholders, it has within less than ten days last past become informed of the names of the principal holders of the bonds bearing its unauthorized and unlawful guarantee thereon for principal and interest and that such endorsed bonds are within the jurisdiction of the court.

On such information and believing the same to be in all respects true, the complainant charges that of the total issue of 2,375 bonds of \$1,000 each issued by the said Richmond, Nicholasville, Irvine & Beattyville Railway Company, the following persons and corporations are the owners and holders of such bonds and the coupons thereto belonging to the amounts set opposite their respective names, that is to say :

Ohio Valley Improvement & Contract Co.....	1,194	bonds.
Vernon D. Price.....	16	"
Louisville Trust Co.	571	"
Aldolphus E. Richards.....	15½	"
Bennett H. Young	65½	"
John W. Stine	18	"
Louisville Trust Co. as assignee of Cornwall & Bro..	8	"
Louisville Trust Co. as assignee of Wm. Cornwall, Jr.	10	"
Thomas W. Bullitt.....	19½	"
43 Theodore Harris....	30	"
Louisville Banking Co.....	161	"
Dennis Long....	10	"
Columbia Finance & Trust Co.....	75	"
Columbia Finance & Trust Co. in trust....	63	"
Bernard Hollmann....	10	"

Each and every of the said persons and corporations are citizens of the State of Kentucky, resident within this district and each and every of the said bonds and coupons thereto belonging so owned or held by the said persons and corporations are now in the city of Louisville and subject to the process and injunction of this court.

The complainant charges that nearly all of the uncanceled 1,106 of its pretended guarantees on such bonds are held by each and every one of the said parties last above named and that they and each of them do give out and pretend that the said illegal and unauthorized guarantees purporting to be executed by complainant are valid and binding upon it and enforceable against its property, and the said Hollman has within a month last past brought suit in the common pleas court of Jefferson county, Kentucky against complainant seeking to enforce its liability as such alleged guarantor upon divers coupons attached to ten of said bonds, which he avers belong to him, and process has been served upon the complainant and such cause is still depending in such State court.

The complainant avers that the controversy as to the validity of said contract dated May 9, 1889, and of its pretended guarantees for the principal and interest of the 1,185 bonds of the issue hereinbefore specified is within the primary and exclusive jurisdiction of this court and that it is entitled to the further benefit and enforcement of the decrees of cancellation hereinbefore entered in this cause until the entire 1,185 pretended guarantees of complainant are brought into court and cancelled and that to allow the said present holders of such pretended and disputed guarantees to alien or encumber or part with the possession of any of such bonds bearing thereon such pretended guarantees or to allow them to bring common-law suits on the constantly maturing coupons will tend to the great fraud and injury of complainant and will create a great multiplicity of suits and increase of cost and expense.

44 The complainant avers that all the allegations contained in its original bill of complaint are true as therein set forth and it therefore prays that leave be granted to file this sup-

plemental bill and that the above-named Vernon D. Price, Bennet H. Young, John W. Stine, Louisville Trust Company as assignee of Cornwall & Bro., Louisville Trust Company as assignee of William Cornwall, Jr., Thomas W. Bullitt, Theodore Harris, Louisville Banking Company, Dennis Long, Columbia Finance and Trust Company and Bernard Hollman be made parties defendant hereto and that due process issue to compel them to appear and answer the original and this supplemental bill but without oath, and that on final hearing the complainant be granted all and singular the relief prayed in and by its original bill as well against those made parties defendant hereby as the original defendants, and it especially prays that the court will forthwith issue its order restraining each and every one of the persons and corporations now made defendants to this bill of supplement and also the Ohio Valley Improvement and Contract Company, Adolphus E. Richards and the Louisville Trust Company from selling, transferring, pledging, encumbering in any way or parting with the possession of any of the railroad bonds issued by the Richmond, Nicholasville, Irvine & Beattyville Railway Company and bearing thereon the pretended endorsement of the complainant or any of the coupons belonging to any of such endorsed bonds, and further restraining them and each of them from sending any of such bonds or coupons out of the jurisdiction of this court or bringing or prosecuting any suit against the complainant to enforce such pretended guarantees against it and for all such further relief as may be equitable.

LOUISVILLE, NEW ALBANY & CHICAGO
RAILWAY COMPANY, *Complainant.*

HENRY CRAWFORD &
W. R. CRAWFORD, *Solicitors.*
HELM & BRUCE, *Solicitors.*

STATE OF ILLINOIS, }
Cook County, } ss :

W. H. McDoel on oath says that he is the general manager of the complainant The Louisville, New Albany & Chicago Railway Company and has as full and particular knowledge concerning the matters in controversy as any other officer or agent of such corporation; that he has read the foregoing supplemental bill and knows the contents thereof and that the matters therein set forth
45 are true to the best of his knowledge, information and belief. The names of the owners of nearly all the uncanceled 1,106 endorsed bonds and the fact that they were held in the city of Louisville only became known to complainant within three days and affiant verily believes that unless a temporary restraining order be at once and without notice granted against such holders that divers of such bonds and coupons will be sent out of the jurisdiction or transferred or other suits brought thereon.

W. H. McDOEL.

Subscribed and sworn to before me this January 27th, 1893.
Witness my hand and official seal.

[SEAL.]

CHAS. E. BYRNE,
Notary Public.

A copy.

Attest:

THOS. SPEED, *Clerk.*

And on another day of said term of said court, to wit, on the 28th day of February, 1893, came the defendants, The Louisville Trust Company and Bernard Hollman by St. John Boyle, their counsel and severally moved that the injunction and restraining order entered in the foregoing cause be discharged and set aside.

The defendants, The Louisville Trust Company and Bernard Hollman by their said counsel filed their separate demurrers to the original & supplemental bills herein.

The demurrer of Louisville Trust Co. above referred to is as follows:

United States Circuit Court for the District of Kentucky.

THE LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. }
vs.
THE OHIO VALLEY IMPROVEMENT & CONTRACT CO. }

The Demurrer of the Louisville Trust Co. to the Original and Supplemental Bill.

The defendant The Louisville Trust Co., not confessing any of the matters in the complainant's original or supplemental bill contained to be true, in manner and form as therein alleged, does demur to the said original and supplemental bill and for cause thereof says that the same does not contain any matter of equity to entitle the complainant to any relief against the said defendant and it prays the judgment of the court whether it shall be compelled to make any further or other answer thereto, and that they be dismissed hence with their costs &c.

ST. JOHN BOYLE,
For Lou. Trust Co.

The undersigned counsel of the Louisville Trust Co. certifies that in his opinion, the foregoing demurrer is well founded in point of law.

ST. JOHN BOYLE.

The affiant, H. V. Loving, says that he is the president of the defendant, The Louisville Trust Co. and that the foregoing demurrer is not interposed for delay.

H. V. LOVING.

Sworn to before me by H. V. Loving, this Feb'y 25th, 1893.

FRANK A. GERST,
N. P., Jeff. Co., Ky.

46 And on the same day, to wit, the 3rd of April, 1893, came the Louisville Banking Company by counsel and filed in our clerk's office of our said court its demurrer herein—
Which is as follows:

Circuit Court of the United States, District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO R'Y Co.	} In Equity.
vs.	
OHIO VALLEY IMPROVEMENT & CONTRACT Co.	

The Demurrer of the Louisville Banking Company to the Bill of Complaint of the Above-named Plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said bill. And for causes of demurrer sheweth,

1st. That it appeareth by the plaintiff's own showing by the said bill, that it is not entitled to the relief prayed by the bill against this defendant.

2. That the said bill is exhibited against this defendant and against several other defendants, to the said bill, for several distinct and independent matters and causes, which have no relation to each other, and in which, or in the greater part of which this defendant is no way interested or concerned and ought not to be implicated.

Wherefore and for divers other good causes of demurrer appearing on said bill, this defendant doth demur thereto. And it prays the judgment of this honorable court whether it shall be compelled to make any answer to said bill; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

A. BARNETT,
Solicitor and of Counsel for Defendant,
Louisville Banking Company.

47 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.
Louisville, Ky., April 3, 1893.

A. BARNETT,
Of Counsel for Defendant Louisville Banking Co.

STATE OF KENTUCKY, }
County of Jefferson, District of Kentucky, } *set:*

Theodore Harris, being duly sworn, deposes and says, I am the president of The Louisville Banking Company which is one of the above-named defendants. The foregoing demurrer is not interposed for delay.

THEODORE HARRIS.

railway bonds to be received by the construction Co. The bill further alleged that this contract had been so far executed that the guaranty of the railway Co. had been endorsed upon 1,185 of the Beattyville R'y Co.'s bonds, which had been delivered to the construction Co. This endorsement upon these bonds was in these words: "For value received, the Louisville, New Albany and Chicago Railway Company, hereby guarantees to the holder of the within bond the payment by the obligor therein, of the principal and interest thereof, in accordance with the tenor thereof."

It also charged that the bonds thus guaranteed had been delivered to the construction Co. and that a large portion of them were still held by the construction Co.; that others had been delivered to certain persons who had subscribed therefor, and who were named as defendants to the bill; that others still, were in the hands of the Louisville Trust Co., to be delivered to subscribers when paid for. The bill alleged such a state of facts as to make the guaranty upon such bonds illegal and fraudulent, and the contract for the guaranty of further bonds to be received by the construction Co. likewise illegal.

49 Upon the filing of the bill the usual injunction was granted, enjoining all of the named defendants from transferring, encumbering, selling or removing from within the jurisdiction of the court any of the bonds thus illegally and fraudulently guaranteed; and such steps were thereafter had, under the original bill and answer, as resulted in a decree cancelling the guaranty upon all the bonds then in the possession or control of the construction Co.

Since that decree, complainant company has filed a supplemental bill, alleging, among other things, that the work of construction on the Beattyville railway has been abandoned; that it is insolvent and in the hands of a receiver appointed by this court, under a bill filed by the holders of its mortgage bonds, and that complainant has lately learned that certain persons, who are made defendants to this supplemental bill, claim to be the owners and holders of Beattyville Railway bonds, many of them guaranteed by complainant Co., and which have not been heretofore cancelled. The supplemental bill prays that these holders of said guaranteed bonds be made defendants, and that they be required to bring their bonds into court and submit to a cancellation of the guaranty thereon.

Certain of these defendants have appeared and demurred, upon the ground that this court has no jurisdiction of the matters complained of, no case appearing on the face of the bill entitling the complainant in a court of equity to any relief against them. Neither the bill nor the supplemental bill contain any specific allegation as to the circumstances under which the demurring defendants became holders of the bonds. It does not affirmatively appear whether they are, or are not, holders for value and without notice. But it seems to me, that where a bill alleges a state of facts, showing that negotiable securities have been issued illegally and fraudulently, and have come into the possession of the defendant, that it devolves upon the defendant, in view of such fraud and illegality, to show that he is a purchaser for value.

"Where fraud or illegality in the inception of a negotiable paper is shown, the endorsee, before he can recover, must prove that he is a holder for value; the mere possession of the paper under such circumstances is not enough."

Story on Prom. Notes, section 196; *Smith vs. Sax County*, 11 Wall., 139.

"It is an elementary rule, that if fraud or illegality in the inception of a negotiable paper is shown, the endorsee, before he can recover, must prove that he is a holder for value; the mere possession of the paper under such circumstances is not sufficient."

50 *Stewart vs. Landsing*, 104 U. S., 505. *Lytle vs. Lansing*, 147 U. S., 59.

For the purpose of this demurrer, the defendants must be treated as standing, with respect to these guaranteed bonds, in no better situation than the construction Co.

Defendants next insist, that a court of equity could not entertain jurisdiction of a suit to set aside any illegal contract, where there is an adequate and sufficient defense at law.

Cancellation is one of those purely equitable remedies, exercised exclusively by courts of equity. The jurisdiction has always existed, but will not generally be exercised if the legal remedy, whether defensive or affirmative, is certain, complete and adequate.

There is a strong line of authority from courts of the highest respectability, supporting the view that equity has jurisdiction to decree cancellation of a deed, bond, note or other obligation, whether the instrument is or is not void at law, or whether it be void for matter appearing on its face or *aliunde*.

Hamilton vs. Cummings, 1 J. C. R. 521, and cases cited, Eng. & Amr. Jones vs. Perry, 2 Yerger, 25. *Johnson vs. Copper*, 2 Yerger, 525.

But in the United States courts the jurisdiction has been much more sparingly exercised, and some circumstance must appear calling strongly for equitable interposition. Thus in the case of *Grand Chute vs. Winegar*, it was held that a bill would not lie to cancel bonds held by the defendant, where it appeared on the face of the bill that the defense at law was perfect. 15 Wall. 373.

Under the strictest limitations as to the circumstances justifying the exercise of equitable jurisdiction for purpose of cancellation, it would seem, that if for any reason it appears that a legal remedy would be inadequate to the attainment of complete justice; as where the instrument sought to be cancelled is negotiable, and has not matured. The remedy at law in such cases must be deemed inadequate, inasmuch as the complainant would be subjected to the hazard of being cut off from defenses if the instrument should come to the hands of an innocent holder for value. So where any vexatious or injurious use of an instrument could be made if suffered to remain in the hands of one not entitled to enforce payment, equity will interpose and cancel the instrument. Pom. Eq. Jur. sec. 221, 911.

I do not at this state of this case deem it necessary or proper to determine whether or not these bonds in the hands of innocent purchasers, for value, would be enforceable against the complainant company. The question should be reserved for further argument and careful consideration. But if the defense of the complainant company should be cut off in case these bonds should pass into the hands of *bona fide* holders, it is clear that equity should interpose and enjoin such transfer and cancel the guaranties endorsed upon them. Upon another ground altogether, I am of opinion that equity has jurisdiction to maintain this bill, and that is, to prevent a multiplicity of suits. Exclusive of the bonds heretofore cancelled, the complainant's guaranty appears upon some six or seven hundred bonds of \$1,000 each.

It would become liable to suits upon coupons upon each bond as it matures. It is obvious, that in course of time these bonds might pass into the hands of hundreds of persons, and the complainant company thus be subjected to a ruinous number of actions. A judgment in its favor, as between it and a particular holder, would not include any other holder. If the defenses to these bonds be treated as purely legal and the remedy sought a legal remedy, the jurisdiction would exist. "It is not essential that the remedy sought shall be purely an equitable remedy. The very fact that a multitude of suits are to be prevented constitutes the very inadequacy of legal methods and remedies, which calls the concurrent jurisdiction of a court of equity into being under such circumstances, and allows it to adjudicate upon purely legal rights and confer purely legal reliefs." 1 Pom. Eq. Jur., sec. 243.

There has been much conflict of authority as to the circumstances which will justify a court of equity in taking jurisdiction to prevent a multiplicity of suits, but an examination of numerous authorities, brings me to the conclusion that where a complainant may be subjected to a multitude of separate suits, by separate claimants, and the judgment in one case would not be conclusive, in others, that a case arises for equitable jurisdiction, if the defendants have a community of interest in the questions at issue and in the kind of relief sought by reason of the common origin of their several claims. This conclusion has the support of Mr. Pomeroy, who, after an elaborate consideration of this question, says: "Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the denials of some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no common title, nor community of right, nor of interest in the subject-matter, but because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained, by or against each individual member of

the numerous body. In a majority of the decided cases, this community of interest in the questions at issue, in the nature and kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body, arise by means of the same unauthorized, unlawful and illegal act of proceeding. Even this external feature of unity, however, does not always exist, and is not deemed essential. Courts of the highest standing and equity have repeatedly appeared and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in term, and arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claims at issue and in the remedy." Pom. Eq. Jur., sec. 221, 911, *et seq.*

The case of New York and New Haven Railway Co. *vs.* Schuyler *et al.*, reported in 17 New York, 592, is an interesting and instructive case. In that case it appeared that spurious certificates of stock in a railroad corporation had been issued by an officer having apparent authority to do so, and undistinguishable on the face from certificates of genuine stock, and were outstanding in the hands of numerous holders. The holders of such spurious certificates were made party defendants to the bill filed by the railroad company. After an elaborate consideration of the question, as to whether or not the bill would lie, that court maintained its jurisdiction, and held that, the false certificate having a common origin and common ground of invalidity with all, though the holders became such under different circumstances and conveyances and claim different rights, yet they were all properly joined as defendants, and the bill maintained as a bill to prevent a multiplicity of suits.

In Supervisors *vs.* Deyoe, we find a similar case. The treasurer of Saratoga county, under an authority to issue notes for money advances to the county to the amount of some \$20,000, issued 73 notes to the amount of \$138,000. These notes were held by 53 persons, many of whom had brought separate suits upon their notes. The supervisors filed a bill in equity against all the holders of

53 said notes, including those who had brought suits at law.

Upon demurrer to the bill, it was held, that upon the face a case was made entitling the plaintiff upon equitable principles to implead the holders of the notes for the purpose of having their respective rights and the liability of the company determined in one action; that the claims were of the same general character, and that the action was maintainable for the purpose of preventing a multiplicity of suits and to protect plaintiff against the hazard of a double recovery. 77 N. Y., 219.

The case of Sheffield Water Works *vs.* Yeoman, 2 Law Reports, Ch. App. case 8 & 11, was this: A very large number of persons held separate claims against the water works company. The claims were for damages originating in an inundation resulting from the breaking of a reservoir. Under a special act commissioners were appointed to inquire into and assess these damages and issue certificates upon the several claims. The water works claimed that

Jefferson in the State of Kentucky, and condemned property in the city of Louisville and in the said county under its authority and for the purposes set forth, and have since and are now using and operating said lines of railroad and the said property so purchased and condemned; and afterwards the said complainant procured another act to be passed by the General Assembly of the Commonwealth of Kentucky, entitled "An act to amend an act entitled An act to incorporate the Louisville, New Albany & Chicago Railroad Company approved April 8th, 1890," which was approved, whereby it was provided and enacted that the said company was authorized and empowered to

55 endorse or guarantee the principal and interest of the bonds of any railway company then constructed or to be thereafter constructed within the limits of the State of Kentucky and the defendant says that by reason of the premises, the said complainant became and was and is a corporation created and existing under and by virtue of the laws of the State of Kentucky, and a citizen thereof, with the rights and powers conferred by the acts aforesaid, and the defendant says that it is not true that all the lines of railroad owned by the complainant *is* situated within the State of Indiana, but on the contrary they have railroad tracks and connecting lines, depot grounds and other property in the city of Louisville aforesaid. This defendant further says it has no knowledge or information sufficient to found a belief whether or not it is true that the certificates of stock issued by the complainant recite that it is a corporation of Indiana but it denies that the complainant possesses no rightful corporate powers or franchises except such as have been granted to it by the State of Indiana; and this defendant further says that it has no knowledge or information upon which to found a belief as to who constituted at the time mentioned in the said bill, the board of directors of the plaintiff nor of the time, manner and substance of any negotiations between the defendant, The Ohio Valley Improvement & Contract Company of the said complainant in relation to the alleged understanding, that said directors and their friends or any of them would purchase any part of the first-mortgage bonds of the said Richmond, Nicholasville, Irvine & Beattyville Railway Co. This defendant has no knowledge, information or belief upon the subject except as contained in the original bill and answer herein, but as to all such charges this defendant demands further proof, and this defendant further says that it has no knowledge, information or belief concerning the alleged acts of Dowd & Carson, or of the board of directors of the said complainant in regard to any purchase of the bonds of such Beattyville Railroad Company, or whether or not there was present at the alleged meeting of directors on October 8th, 1889, any lawful quorum of directors of which, if any, directors were present at any such meeting. This defendant has no knowledge, information or belief that any of the allegations in relation thereto are true and this defendant has no knowledge, belief or information sufficient to form a belief that the said directors or officers or any of them passed any resolution or made any agreement or purchased any of such bonds under the circumstances set forth in the said bill or that any of such

56 circumstances as alleged, existed in fact. On the contrary, this defendant alleges upon information and belief, that the board of directors of the complainant in good faith and believing it to be for the interest of the complainant made and entered into the arrangement to guarantee the bonds of the said Richmond, Nicholasville, Irvine & Beattyville Railroad Co.; that a lawful quorum was present and the said arrangement was approved, ratified and confirmed by more than a majority of all of such board of directors.

This defendant denies that the president of the complainant illegally or without right endorsed the guarantee upon the said bonds or any of them; and this defendant has no knowledge or information that the said guarantee was not fully authorized or ratified by the holders of a majority in amount of the capital stock of the complainant and this defendant denies that the complainant before then above-mentioned guarantee, had guaranteed the bonds of the Louisville Southern Railroad Company or any part thereof.

And this defendant says that the said complainant having full and lawful authority, did make and endorse upon each of said 1,185 bonds, its agreement and guarantee of the payment of the principal and interest of such bonds to the holder according to the tenor thereof, a copy of the said guarantee is attached hereto, marked Exhibit A, and did thereupon receive and take possession of a majority of the stock of the said Richmond, Nicholasville, Irvine & Beattyville Railroad Company in accordance with the agreement under which such guarantee was made and to that extent fully completed and executed the said agreement.

And this defendant further says that it is now the holder of \$125,000 of the said bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company and upon each of said bonds the said complainant by its agreement endorsed thereon duly and fully executed, guaranteed the payment of the principal and interest thereof according to the tenor thereof, and this respondent is the holder thereof in good faith and became such for value and without notice of any defect, irregularity or fraud in connection therewith.

This defendant says that it became the holder of such bonds as follows:

57 On September 13th, 1889, it loaned the Ohio Valley Improvement & Contract Company \$100,000 for which it took the note of said improvement company of such date, payable four months thereafter with \$216,000 of the first-mortgage bonds of the said Richmond, Nicholasville, Irvine & Beattyville Railroad Company as collateral and which said bonds were numbered from one to two hundred and sixteen inclusive and which did not have thereon the guaranty of the complainant; that afterwards on the 20th of November, 1889, this defendant made an agreement with the said improvement company by which it agreed to surrender the said 216 bonds and to take in lieu thereof as collateral security for the said loan \$125,000 of said bonds guaranteed by the complainant and that the said improvement company received the said

216 bonds and placed in their stead until the guaranteed bonds should be delivered to this defendant 125 of similar bonds Nos. 647 to 771 inclusive; that the said note of September 13th was not paid at maturity but was renewed on January 16th, 1890, for six months and that afterwards on March 17th, 1890, those bonds were withdrawn and similar bonds guaranteed by the complainant were substituted in lieu thereof as had been agreed and which bonds were numbered from 1051 to 1175 inclusive and which bonds have ever since, and are now held by this defendant as collateral as aforesaid. The said note of January 16th was not paid at maturity but was renewed by a new note dated July 19th, 1890, payable four months thereafter and 75 bonds of the same issue numbered from 1620 to 1694 inclusive but which were not guaranteed by the complainant were added as additional collateral, the said last-mentioned note was not paid at maturity but was renewed by a note dated November 22nd, 1890, at four months with the same collateral. The said note was not paid at maturity but on March 23rd, 1891, was renewed by a note of the said improvement company dated March 17th, 1891, due July 1st, 1891, fixed for \$125,000 and at the same time this defendant loaned the said improvement company an additional \$25,000 and for the said note it continued to hold the before-mentioned collateral and received as additional security other bonds of the same issue numbered from 1401 to 1450 inclusive, Nos. 1186 to 1198 inclusive, 1751 to 1787 inclusive, 2301 to 2375 inclusive, 2176 to 2200 inclusive, none of which new bonds were endorsed by the complainant.

This defendant says that certain of the said bonds were afterwards during the currency of said note exchanged for bonds which were endorsed by the complainant but from which the said endorsement has with the consent of this defendant been erased; that this defendant now only holds the \$125,000 of bonds guaranteed as aforesaid, numbered from 1051 to 1175 inclusive, which said bonds it received as above set forth on March 17th, 1890, in pursuance of the previous agreement to surrender the \$216,000 of unguaranteed bonds and receive \$215,000 of guaranteed bonds in lieu thereof; that no part of the debt has ever been paid but the same has been increased as above set forth and the defendant has continued from that time to hold the said bonds as collateral aforesaid.

This defendant at the time of making the said agreement and at the time it received the said guaranteed bonds had no knowledge, information or belief or any reasonable grounds to believe or suspect and does not now believe that the said bonds had been issued by or through any fraud or fraudulent agreement of the officers of complainant or of the Ohio Valley Improvement Company or that the said guarantee had been authorized at any meeting of directors at which there were present less than a quorum or that the same had not been authorized and approved upon the petition or by a vote of the majority of the stockholders of the complainant, but on the contrary says it believed that all necessary and lawful steps had been taken and that the said guarantee of the complainant endorsed

on said bonds was authorized, legal and binding and on the faith thereof this defendant surrendered the other bonds and renewed its loans and loaned still additional money to the Ohio Valley Improvement & Contract Company as above set forth.

Wherefore the defendant prays that the original and supplemental bills be dismissed, the injunction herein discharged for judgment for its costs and for all other proper relief.

ST. JOHN BOYLE,
Solicitor for Defendant.

Guaranty (Copy).

"For value received the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond, the payment by the obligor therein of the principal and interest thereof in accordance with the tenor thereof.

In witness whereof the said railway company has caused its corporate name to be signed hereto by its president and its seal to be attached by its secretary."

And on September 16th, 1893, came the complainant by counsel and filed its replication to the answer of the Louisville Trust Company herein.

59 (Replication omitted by stipulation.)

Came also the Louisville Trust Company by counsel and filed exceptions to the depositions of H. V. Loving, A. E. Richards, Louis V. Cassilly and Wm. G. Wetterer taken on behalf of complainant herein, and the court not being advised thereof takes time.

The exceptions of Louisville Trust Co. referred to are as follows:

United States Circuit Court for the District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY	}
<i>vs.</i>	
OHIO VALLEY IMPROVEMENT COMPANY, &C.	

Exceptions of the Louisville Trust Company to the Depositions of H. V. Loving, A. E. Richards, Louis V. Cassilly, Wm. G. Wetterer.

The defendant, The Louisville Trust Company excepts to the reading of the depositions of H. V. Loving, A. E. Richards, Louis V. Cassilly, and Wm. G. Wetterer, heretofore taken in this suit on behalf of the complainant and certified by Charles A. Graham, special examiner, February 21st, 1893, because the same were taken prematurely and before the cause was at issue and without any special order or leave of court.

Wherefore this defendant prays that the said depositions be suppressed.

ST. JOHN BOYLE,
Att'y for Louisville Trust Co.

And at a term of our court held for its October term, 1893, to wit, on the 2nd day of October, 1893, came The Louisville Banking Company and Theodore Harris defendants herein by counsel and filed their separate answers to the original and supplemental bill of complaint herein.

The answer of Louisville Banking Company is as follows :

60 United States Circuit Court for the District of Kentucky.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILROAD COMPANY	} Answer of Louisville Banking Company.
vs.	
THE OHIO VALLEY IMPROVEMENT & CON- TRACT COMPANY.	

The defendant The Louisville Banking Company, for answer to the original and supplemental bills of complaint of the said Louisville, New Albany & Chicago Railway Company, or so much thereof as they are advised is material or sufficient to be answered, say, that it is a banking corporation, created, organized and existing as such under and by virtue of an act of the General Assembly of the Commonwealth of Kentucky, entitled, "An act to incorporate the Louisville Banking & Insurance Company," approved January 24, 1867, with various amendments thereto, with power to sue and be sued, contract and be contracted with, to discount and buy notes and bills of exchange; to lend money, and to carry on a general banking business, with the principal place of business at Louisville, Ky.

This defendant says that the said complainant, The Louisville, New Albany & Chicago Railway Company, is a citizen of the State of Kentucky, duly created and existing as such corporation under and by virtue of the laws of the State of said State; that the said complainant procured to be passed by the General Assembly of the Commonwealth of Kentucky an act entitled "An act to incorporate the Louisville, New Albany & Chicago Railway Company," approved April 8, 1880, under and by which act the said complainant was thereby constituted a corporation, with power to sue and be sued; contract and be contracted with; to have and use a common seal, with the power incident to corporations and authority to operate a railroad; that the said corporation was thereupon authorized to purchase real estate for its purposes and build connecting lines of railroad, with the right to condemn all property required for the carrying out of such objects, and were authorized to issue bonds upon the same and secure the payment thereof by a mortgage upon its property, rights and franchises; and the provisions of the said act were accepted by the complainant, and under the authority thereof they built lines of railroad in the county of Jefferson, in the State of Kentucky, and condemned property in the city of

61 Louisville and in the said county, under its authority and for the purposes set forth, and have since and are now using and operating said lines of railroad and the said property so purchased and condemned; and afterwards the said complainant pro-

cured another act to be passed by the General Assembly of the Commonwealth of Kentucky, entitled, "An act to amend an act entitled 'An act to incorporate the Louisville, New Albany & Chicago Railway Company, approved April 8, 1880,'" which was approved, whereby it was provided and enacted that the said company was authorized and empowered to endorse or guarantee the principal and interest of the bonds of any railroad company then constructed or to be thereafter constructed within the limits of the State of Kentucky, and the defendant says that by reason of the premises the said complainant became and was and is a corporation created, and existing under and by virtue of the laws of the State of Kentucky and a citizen thereof, with the rights and powers conferred by the acts aforesaid, and defendant says that it is not true that all the lines of railroad owned by the complainant are situated within the State of Indiana, but on the contrary, they have railroad tracks and connecting lines, depot grounds and other property in the city of Louisville aforesaid.

This defendant further says that it has no knowledge, or information sufficient to found a belief whether or not it is true that the certificates of stock issued by the complainant recite that it is a corporation of Indiana, but it denies that the complainant possessed no rightful corporate powers or franchises such as have been granted to it by the State of Indiana, and this defendant further says that it has no knowledge or information upon which to found a belief as to who constituted at the time mentioned in said bill, the board of directors of the plaintiff, nor of the time, manner or substance of any negotiations between the defendant The Ohio Valley Improvement & Contract Company, or the said complainants, in relation to the alleged understanding, that said directors and their friends, or any of them would purchase any part of the first-mortgage bonds of the said Richmond, Nicholasville, Irvine & Beattyville Railway Company.

This defendant has no knowledge, information or belief upon the subject, except as contained in the original bill and answer herein, but as to such charges this defendant demands further proof, and this defendant further says that it has no knowledge, information or belief concerning the alleged acts of Dowd and Carson, or of the board of directors, of the said complainant in regard to any purchase of the bonds of such Beattyville Railroad Company, or
62 whether or not there was present at the alleged meeting of directors on October 8, 1889, any lawful quorum of directors, or which if any directors were present at any such meeting.

This defendant has no knowledge, information or belief that any of the allegations in relation thereto are true, and this defendant has no knowledge, information or belief, sufficient to form a belief that the said directors or officers or any of them passed any resolution or made any agreement or purchased such bonds under the circumstances set forth in the said bill, or that any of such circumstances as alleged existed in fact. On the contrary, this defendant alleges upon information and belief that the board of directors of the complainant in good faith and believing it to be for the interest

of the complainant, made and entered into the arrangement to guarantee the bonds of the said Richmond, Nicholasville, Irvine & Beattyville Railroad Company; that a lawful quorum was present, and the said arrangement was approved, ratified and confirmed by more than a majority of all of such board of directors.

This defendant denies that the president of the complainant illegally or without right or power endorsed the guarantee upon the said bonds, or any of them; and this defendant has no knowledge or information that the said guarantee was not duly authorized or ratified by the holders of a majority in amount of the capital stock of the complainant; and this defendant denies that the complainant before the above-mentioned guarantee, had guaranteed the bonds of the Louisville Southern Railroad Company or any part thereof.

And this defendant says that the said complainant having full and lawful authority, did make and endorse upon each of said 1,185 bonds, its agreement and guarantee of the payment of the principal and interest of such bonds to the holder, according to the tenor thereof, and did thereupon receive and take possession of a majority of the stock of the said Richmond, Nicholasville, Irvine & Beattyville Railroad Company, in accordance with the agreement under which such guarantee was made, and to that extent fully completed and executed the said agreement. A copy of the said guarantee is attached hereto marked "Exhibit A."

This defendant further says that it is now the holder and owner of ten thousand (\$10,000) dollars of the said bonds Nos. 160 to 169, both inclusive, of the par value of one thousand (\$1,000) dollars each, of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, and upon each of said bonds said complainant by its agreement endorsed thereon, duly and fully executed, guaranteed the payment of the principal and interest thereof according to the tenor thereof, and this defendant is the holder and owner thereof in good faith, and became such for value and without notice of any defect, irregularity or fraud in connection therewith.

This defendant says that the said bonds were pledged to it in the regular course of its business, to secure the payment of a debt simultaneously created with said pledge, and that at the maturity of said debt for which said ten bonds were pledged to secure; the makers of the notes for which the same were pledged failed to pay said notes, and this defendant, in accordance with the terms of said pledge, advertised and sold the same at public auction, at which the same were bid in and bought for and by this defendant, and this defendant is now the owner and holder thereof.

This defendant says that it is the holder of forty-eight other of said bonds guaranteed as aforesaid, viz: 242, 243, 138, to 143 both inclusive; 117 to 115 both inclusive; 238 to 239 both inclusive; 258 to 260 both inclusive; 240 to 241 both inclusive; 225 to 227 both inclusive; 203 to 212 both inclusive; 155 to 159 both inclusive; 118 to 122 both inclusive; 29 to 30 both inclusive; 200 to 202 both inclusive; which were and are now pledged to this defendant

simultaneously with the creation of the debts for which they were pledged, to secure all of which debt-are due this defendant and unpaid, and upon each of said bonds the complainant by its agreement endorsed thereon, duly and fully executed, guaranteed the payment of the principal and interest thereof, and this defendant is the holder thereof in good faith, and became such for value and without notice of any defect, irregularity, or fraud in connection therewith, prior to the 15th day of May, 1890.

This defendant says that at the time of receiving and accepting the pledge of said bonds it had no knowledge, information or belief, or any reasonable grounds to believe or suspect, and does not now believe that the said bonds have been issued by or through any fraud, or fraudulent agreement of the officers of the complainant, or of the Ohio Valley Improvement & Contract Company, or that the said guarantee had been authorized at any meeting of directors at which there were present less than a quorum; or that the same had not been authorized and approved upon the petition, or by a vote of the majority of the stockholders of the complainant; but on the contrary says it believes that all lawful and necessary steps had been taken, and that said guarantee of complainant endorsed on said bonds was authorized, legal and binding, and
 64 on the faith thereof this defendant accepted and received the pledge of said bonds and lent money thereon as aforesaid.

This defendant denies that the holders of the guaranteed bonds aforesaid are numerous, or that there is any danger, or that there will be any multiplicity of suits against the complainant on account thereof, and this defendant is informed and believes that there is now pending against the complainant on account of such guarantee only one suit, to wit, that brought by the defendant, Bernard Hollman, and that no other suits are or have been threatened against the complainant up to the present time.

This defendant denies that it is the owner or holder of 161 of said guaranteed bonds or coupons, and as alleged in the bill and supplemental bill, but this defendant is the holder and owner of 58 of said bonds and coupons, which were acquired by this defendant as hereinbefore set out.

Wherefore, this defendant prays that the original and supplemental bills be dismissed; the injunction herein discharged, for judgment for its costs and all proper relief.

BARNETT, MILLER & BARNETT,

Att'ys for Lou. B'k'g Co.

THEODORE HARRIS.

STATE OF KENTUCKY, }
Jefferson County, } *set:*

Personally appeared before the undersigned, a notary public in and for the State and county aforesaid, Theodore Harris, on September 19, 1893, who being duly sworn deposed that he is the president of The Louisville Banking Company (def't) and that all of the statements contained in the foregoing answer of his own knowledge

are true, and those upon information and belief he believes to be true.

[SEAL.]

E. D. WHISLER,
N. P., Jeff. Co., Ky.

The "guaranty" referred to in above answer is as follows:

(Guaranty.)

For value received the Louisville, New Albany & Chicago
65 Railway Company hereby guarantees to the holder of the
within bond, the payment by the obligor therein of the principal and interest thereof, in accordance with the tenor thereof.

In witness whereof the said railway company has caused its corporate name to be signed hereto by its president and its seal to be attached by its secretary.

And on the 24th day of October, 1893, came the complainant by counsel and filed its separate replications to the answers of Bernard Hollman, Theodore Harris and the Louisville Banking Company herein.

Which said replications being similar to the one of said complainant filed on the 16th of September, 1893, to answer of the Louisville Trust Company, are not here repeated.

And on the 6th day of November, 1893, came the Louisville Banking Company and Theodore Harris by counsel and filed in the clerk's office of our said court their respective exceptions to depositions of Richards, &c., which are as follows:

66 United States Circuit Court, Sixth Kentucky District.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,)
Complainant,

vs.

OHIO VALLEY IMPROVEMENT & CONTRACT CO. *et al.*,
Defendant-.

} 6075.

Exceptions of the Louisville Banking Co. to the depositions of Attila Cox, H. V. Loving, A. E. Richards, Louis V. Cassilly, B. H. Young, J. M. Fetter, Theodore Harris, W. G. Wetterer, and V. D. Price.

The defendants The Louisville Banking Company, objects and excepts to the reading of depositions of Attila Cox, H. V. Loving, A. E. Richards, Louis V. Cassilly, B. H. Young, Theodore Harris, J. M. Fetter, W. G. Wetterer and V. D. Price, hereinbefore taken in this action on behalf of the complainant and certified by Charles A. Graham, special examiner, February 21, 1893, because said depositions were taken prematurely, and before the cause was at issue, and without any special order or leave of court or notice to this defendant.

Wherefore, this defendant prays that the said depositions be suppressed.

BARNETT, MILLER & BARNETT,

Att'ys for Lou. B'k'g Co.

Exceptions of Harris above referred to are similar to exceptions filed by Lou. B'k'g. Co., and are not here repeated.

And on another day of our October term of said court, to wit, on the 2d day of December, 1893, comes complainant by its solicitors and on leave of court first had and obtained files its second supplemental bill herein duly verified by affidavit making new parties to this cause and praying the granting of an injunction as hereinafter stated. It is thereupon ordered that the following parties named in said supplemental bill be made defendants in this cause and that process issue against them to appear herein, viz: W. H. Dillingham, J. H. Leathers, Mrs. S. F. Forrester, M. A. Kuston, Ben. C. Weaver, Jr., R. L. Whitney, R. Whitney, A. Schwabacker, S. A. Cannon, Burton A. Duerson, W. M. Carlton, J. A. Shuttleworth,

67 A. J. Ross, John T. Bate, Jr., Allen R. White and Kentucky National Bank. And upon the statements in the verified supplemental bill contained, and on motion of complainant's solicitors, it is by the court now ordered that the said Kentucky National Bank, W. C. Nones, W. H. Dillingham, J. W. Leathers, Mrs. S. F. Forrester, M. A. Kuston, Ben. C. Weaver, Jr., R. L. Whitney, R. Whitney, A. Schwabacker, S. A. Cannon, Burton A. Duerson, W. M. Charlton, J. A. Shuttleworth, A. J. Ross, John T. Bate, Jr., and Allen R. White be and they are hereby enjoined and restrained from selling, transferring, pledging or encumbering or in any way parting with the possession of any of the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railway Company, or the coupons thereto belonging purporting to be guaranteed by the complainant. And they are also enjoined from sending any of such bonds or coupons out of the jurisdiction of this court, or from bringing or further prosecuting any suit or suits against the complainant to recover on any of such bonds or coupons. And the court not being advised of this motion takes time.

The second supplemental bill referred to is as follows:

United States Circuit Court, District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY

vs.

OHIO VALLEY IMPROVEMENT & CONTRACT COMPANY
and Others.

} In Equity.

The Second Supplemental Bill of the said Louisville, New Albany & Chicago Railway Company.

The complainant by way of second supplement to its original bill shows to the court:

That heretofore, to wit, on April 9th, 1890, it filed its original

bill in this court against the above-named Ohio Valley Improvement & Contract Company, The Richmond, Nicholasville, Irvine & Beattyville Railway Company, The Louisville Safety Vault and Trust Company, The Louisville Trust Company, Adolphus E. Richards, William Cornwall, Jr., James M. Fetter and divers other defendants, wherein and whereby it alleged that it was a corporation organized under the laws of the State of Indiana and owned and operated a line of railroad between Louisville in the

68 State of Kentucky and Chicago in the State of Illinois and further charged that its directors and officers had without any authority from its stockholders and contrary to law about May 9, 1889, executed a written contract with the said Ohio Valley Improvement & Contract Company, which purported to bind the complainant to guarantee the payment of the principal and interest of \$2,375,000 of the first-mortgage bonds of the Richmond, Nicholasville, Irvine & Beattyville Railway Company and also that the officers of complainant had without authority and unlawfully actually endorsed the absolute guarantee of the complainant upon \$1,185,000 of such bonds and that the defendants owned and held in possession divers of such bonds bearing what purported to be the endorsement and guarantee of the complainant, and it thereupon prayed for the cancellation of such unlawful contract and guarantees and pending final hearing that an injunction might be granted by the court restraining each of the defendants from suing on such endorsements or selling, encumbering or parting with the possession of any of such guaranteed bonds or sending them out of the jurisdiction and for other relief.

Thereafter process to appear and answer in the premises was duly served upon each and every of the defendants whose names have been hereinbefore at large recited and an answer has been filed in substance admitting the material allegations of the complainant's bill, and replication has been filed to each answer.

On the filing of such bill, a temporary restraining order was granted against disposing of or encumbering any of the said guaranteed bonds or sending the same out of the jurisdiction and afterwards on notice and full hearing on May 28, 1890, an injunction was granted to like effect, which order of court is still in full force.

Thereafter a stipulation in writing was filed in the cause wherein it is admitted that the guarantee on such bonds purporting to bind the complainant was executed by its then officers without any vote of or authority from the stockholders of complainant.

On October 3, 1891, a decree was entered in said cause cancelling the guarantee of complainant on the bonds of said Richmond, Irvine & Beattyville Railway Company numbered from 601 to 675 both inclusive and such bonds were produced in open court and stamped in accordance with such decree of cancellation, which decree is in full force and effect.

On November 4, 1891, a like decree of cancellation was entered herein cancelling such guarantees upon the bonds of said issue numbered 676 to 767 both inclusive, and such bonds were

69 produced in open court and stamped in accordance with such decree of cancellation which decree is still in full force and effect.

Complainant further shows that on January 28th, 1893, it filed its supplemental bill herein in which it alleged that since the institution of the action the work of construction on the said Richmond, Nicholasville, Irvine & Beattyville railway had wholly ceased and that such company had become hopelessly indebted and insolvent and that the Central Trust Company, the trustee in said first mortgage, has brought suit in this court against said railway company to foreclose said mortgage and sell the said railway company, and that for many months all of the mortgaged property has been in the possession of and operated by John MacLeod as the receiver of this court.

That on November 13th, 1891, in accordance with and in execution of the conditions in said trust deed contained the holders and owners of 2,261 bonds secured thereby being more than a majority thereof, served a written notice by them signed upon the said Central Trust Company declaring that for default in payment of an installment of semi-annual interest they elected to declare the entire principal of said \$2,375,000 of mortgage bonds issued by said Richmond, Nicholasville, Irvine & Beattyville Railway Company to be at once due and payable and ordered said trust company to proceed to enforce the collection of the principal and interest of all such bonds by the foreclosure of said mortgage and sale of the property.

Complainant filed with said first supplemental bill a certified copy of the bondholders' declaration as Exhibit A, and prayed that the same might be taken as a part of the supplemental bill.

Complainant showed that by the publication of the deposition of a witness taken for use in such foreclosure proceeding it had within less than ten days of that date become informed of the names of the principal holders of the bonds bearing its unauthorized and unlawful guarantee and on such information as the complainant derived therefrom and believed to be true the complainant charged that of the total issue of 2,375 bonds of \$1,000 each issued by the said Richmond, Nicholasville, Irvine & Beattyville Railway Company, certain persons therein named and made parties were the owners and holders of such bonds and coupons.

Complainant charged that nearly all of the uncanceled 1,106 of its pretended guarantees on such bonds were held by each and every of the parties named therein, and that they and each of them
70 do give and pretend that the said illegal and unauthorized guarantees purporting to be executed by complainant were valid and binding, and alleged that one Hollman had within a month prior thereto instituted suit in the common pleas court of Jefferson county, Kentucky, against complainant seeking to enforce its liability as such guarantor upon divers coupons attached to ten of said bonds, which he averred belonged to him and that process had been served upon the complainant, and that such cause was then pending in said State court.

Complainant shows that upon the filing of said supplemental bill

this court granted to it an injunction restraining the parties named therein from selling, transferring, pledging, encumbering or in any way parting with the possession of any of the bonds held by them bearing thereon the pretended endorsement of the complainant or any of the coupons belonging to any such endorsed bonds, and further restraining them and each of them from sending any such bonds or coupons out of the jurisdiction of the court, or from bringing or prosecuting any suit against the complainant to enforce such pretended guarantee against it.

Complainant alleges that at the time it filed its first supplemental bill it made parties thereto all persons who within the knowledge or information of complainant owned or held any of said bonds. Complainant says that it has within the last few days as owner or in pledge to secure debt — a number of the said bonds bearing thereon the pretended endorsement of complainant, and that also each hold a number of the said bonds bearing thereon the pretended endorsement of complainant.

Complainant further shows that W. C. Nones has instituted within the last two weeks, and that on November 23rd, 1893, W. H. Dillingham, J. H. Leathers, Mrs. S. F. Forrester, M. A. Huston, Ben. C. Weaver, Jr., R. L. Whitney, R. Whitney, A. Schwabacker, S. A. Cannon, Burton A. Duerson, W. M. Charlton, J. A. Shuttleworth, A. J. Ross, John T. Bate, Jr., and Allen R. White instituted in the Jefferson circuit court of Kentucky fifteen different suits against complainant seeking to enforce its liability as such alleged guarantor upon divers coupons attached to a number of said bonds which each of them claim to own and possess, and process has issued against the complainant.

Each and every of such persons and corporations are citizens of the State of Kentucky resident within this district, and each and every of the bonds and coupons thereto belonging so owned
71 or held by the said persons and corporations are now in the city of Louisville and subject to the process and injunction of this court, each of said parties are giving out and pretending that the said illegal and unauthorized guarantees purporting to be executed by complainant are valid and binding upon it and enforceable against its property.

Complainant avers that before the bringing of their respective suits each and every of the defendants hereto had actual knowledge of the filing of the original and supplemental bill and the objects and purposes of each and of the orders of this court entered upon each.

The complainant further avers that the controversy as to the validity of said contract dated May 9th, 1889, and of its pretended guarantees for the principal and interest of the 1,185 bonds of the issue hereinbefore specified is within the primary and exclusive jurisdiction of this court, and that it is entitled to the further benefit and enforcement of the decrees of cancellation hereinbefore entered in this cause until the entire 1,185 pretended guarantees of complainant are brought into court and cancelled, and that to allow the said present holders of such pretended and disputed guarantees

to alien or encumber or part with the possession of any of such bonds bearing thereon such pretended guarantees or to allow them to bring common-law suits on the constantly maturing coupons will tend to the great fraud and injury of complainant and will create a great multiplicity of suits and increase of cost and expense.

Complainant avers that all the allegations contained in the original bill of complaint and in the first supplement thereto are true as therein set forth, and it therefore prays that leave be granted to file this supplemental bill; and that the above-named Kentucky National Bank, W. H. Dillingham, J. H. Leathers, Mrs. S. F. Forrester, M. A. Huston, Ben. C. Weaver, R. L. Whitney, R. Whitney, A. Schwabacker, S. A. Cannon, Burton A. Duerson, W. M. Charlton, J. A. Shuttleworth, A. J. Ross, John T. Bate, Jr., Allen R. White and W. C. Nones be made parties defendant hereto, and that due process issue to compel them to appear and answer the original —, the first supplemental bill, and this supplemental bill, but without oath, and that on final hearing the complainant be granted all and singular the relief prayed in and by its original bill as well as against those made parties defendants hereby and by the first supplemental bill as the original defendants, and especially prays that the court will forthwith issue its order restraining each and every of the persons and corporations now made defendants to this bill of

72 supplement from selling, transferring, pledging, encumbering in any way or parting with the possession of any of the railroad bonds issued by the Richmond, Nicholasville, Irvine & Beattyville Railway Company and bearing thereon the pretended endorsement of the complainant or any of the coupons belonging to any of such endorsed bonds, and further restraining them and each of them from sending any of such bonds or coupons out of the jurisdiction of this court or bringing or prosecuting any suit against the complainant to enforce such pretended guarantees against it, and for all such further relief as may be equitable.

LOUISVILLE, NEW ALBANY & CHICAGO
RAILWAY COMPANY, *Complainant.*

HENRY CRAWFORD &
W. R. CRAWFORD, *Solicitors.*
HELM & BRUCE, *Solicitors.*

STATE OF KENTUCKY, }
County of Jefferson, } ss:

W. H. Newman, on oath says he is the general agent of the complainant, The Louisville, New Albany & Chicago Railway Company and has full and particular knowledge concerning the matters in controversy, that he has read the foregoing supplemental bill, knows the contents thereof, and that the matters therein set forth are true to the best of his knowledge, information and belief.

W. H. NEWMAN.

Subscribed and sworn to before me this 29th day of November, 1893.

M. McLAUGHLIN,
N. P. J. C., *Ky.*

Exhibit "A," filed with first supplemental bill, is as follows :

Whereas, the Richmond, Nicholasville, Irvine & Beattyville Railroad Company on July 1st, 1889, made and delivered to the Central Trust Company of New York, trustee, a deed of trust or mortgage conveying the railroad properties and franchises of such railroad company to the said trust company, to secure an issue of \$2,375,000 of such railroad company's bonds, and it was provided that if any of the interest coupons secured by the said deed of trust should remain unpaid more than six months after they should have become due and should have been presented and payment thereof demanded at the place where they are payable, the principal sum mentioned in each and all of the bonds secured

73 thereby and then outstanding and unpaid, become forthwith due and payable; and it was further provided that said option should be exercised by a written notice thereof, given to the said trustee and should take effect and cause the principal of said bonds to become due as soon as such notice should be served upon the trustee.

And whereas, the said coupons were payable at a designated agency of the said company in the city of New York, and the said company neglected and failed to designate any such agency and refused to pay any of the coupons attached to the said bonds and which became due on January 1, 1891, and also on those which became due on July 1, 1891, although coupons which fell due at such dates were presented to the said company and payment thereof demanded.

Now, therefore, the undersigned holders of the amount of the said issue of bonds set opposite their respective names and aggregating more than a majority of all such bonds now outstanding, do hereby exercise their option to have the principal of such bonds become forthwith due and payable, and do hereby give notice to the trustee thereof; and in case any of the said bonds or coupons shall remain unpaid after the principal shall have become due as above provided, the undersigned request the said trustee in accordance with the provisions of such deed of trust to enter upon and take immediate possession by themselves or the authorized agents of all and singular the said mortgaged premises and every part thereof, and to hold, use and operate the same in accordance with the terms of such mortgage, and further request the said trustee to institute proceedings in some court having jurisdiction for a foreclosure of the lien created by the said deed, the appointment of a receiver and a judicial sale of the mortgaged premises; and the said undersigned holders of such bonds do hereby agree to indemnify and hold harmless, the said trustee from any loss or damage on account of costs, counsel fees and other expenses of such litigation.

In witness whereof, the undersigned have hereunto set their hands this 13th day of November, 1891.

Ohio Valley Improvement and Contract Company, by A. E. Richards, president, 1,194 bonds, \$1,194,000.

Vernon D. Price, 16 bonds \$16,000.

The Louisville Trust Company, by H. V. Loving, president, 571 bonds collateral.

A. E. Richards, 15½ bonds \$15,333½.

Bennett H. Young, 10½ bonds \$10,333½.

Bennett H. Young, 55 collateral.

J. W. Stine, 18 bonds \$18,000.

74 The Louisville Trust Company, assignee of Cornwall & Bro., by H. V. Loving, president, 8 bonds.

The Louisville Trust Company, assignee of Wm. Cornwall, Jr., by H. V. Loving, president, 10 bonds.

Thos. W. Bullitt, 16 bonds; also Thos. W. Bullitt, 3½ bonds.

Theodore Harris, 30 bonds.

Louisville Banking Company, holding as collateral, 161 bonds.

Dennis Long, 10 bonds.

Columbia Finance and Trust Company, by E. T. Halsey, president, as collateral, 75 bonds; in trust, 68 bonds.

A copy.

Witness my hand and seal of said court this 25th day of January, 1893.

[SEAL.]

THOS. SPEED, *Clerk.*

And on the 4th day of May, 1894, came the parties by their counsel and the Louisville Banking Company by counsel and filed their stipulation herein:

Which is as follows:

Circuit Court of the United States for the District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY	}
vs.	
THE OHIO VALLEY IMPROVEMENT & CONTRACT COMPANY.	}

Stipulation.

It is agreed between the parties hereto that the contract between the Louisville, New Albany & Chicago Railway Company and the Ohio Valley Improvement & Contract Company filed with a bill of complaint herein and the endorsement of the bonds by the former of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, were executed upon the sole authority of the board of directors of the Louisville, New Albany & Chicago Railway Company, and that no petition of any of the stockholders of the said company requesting said endorsement in the manner pointed out by section 3951 A, B, C of the Statutes of Indiana or in any other manner was ever signed or executed and no authority was conferred by said stockholders upon such directors and such directors had only such authority as existed by virtue of their existence as such directors.

It is further agreed that the guaranteed bonds referred to, numbered from 1 to 600 inclusive were endorsed with such guarantee by the officers of the Louisville, New Albany & Chicago Railway

Company on the — day of December, 1889; that 585 of such bonds numbered from 601 to 1185 inclusive were so endorsed and delivered on the 11th of March, 1890, that the regular meeting of the stockholders of the Louisville, New Albany & Chicago Railroad Company convened on the next day, March 12th, 1890, and no meeting had been held after the above contract of guarantee had been entered into until such regular meeting was held on the 12th day of March, 1890, and on which day, a majority of the board of directors were changed and such meeting then adjourned to the 22nd day of March, 1890; that at such adjourned meeting the board of directors reported to the stockholders that the before-mentioned bonds
75 had been guaranteed and a resolution was adopted by a majority of all the outstanding stockholders objecting thereto and disclaiming any liability by reason of such guarantee.

It is further agreed that the affidavits of John A. Hilton and exhibits thereto, John B. Carson, William Dowd, Elihu Root, R. R. Hitt, Jewell Erhardt, heretofore filed in this case may be deemed as properly taken depositions and may be read, subject to such exceptions for irrelevancy and incompetency as if they were depositions.

ST. JOHN BOYLE,

*Att'y for B. H. Young, B. Hollman, W. C. Nones, and
Lou. Trust Co.*

NOBLE & SHERLEY,

*Counsel for R. H. Dillingham, Jno. T. Bate, Jr., A. J. Ross,
W. M. Charlton, A. Schwabacher, R. Whitney, M. A. Huston,
Jno. H. Leathers, Allen R. White, J. A. Shuttleworth,
Burton A. Duerson, S. A. Cannon, R. L. Whitney, Ben. C.
Weaver, Jr., Mrs. S. F. Forrester.*

HUMPHREY & DAVIE,

Att'ys for Ky. Nat'l Bank.

BENNETT H. YOUNG,

Att'y for J. W. Stine.

And on another day, to wit, on the 8th day of May, 1894, came the parties by their counsel and on their motion it is ordered that the depositions herein be opened and published. Came also Theodore Harris and the Louisville Banking Company by counsel and filed separate exceptions to the deposition of J. A. Hilton, taken in New York city March 28, 1894.

Which exceptions are as follows, respectively, to wit:

United States Circuit Court for the District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO
RAILWAY COMPANY, Plaintiff,
vs.
OHIO VALLEY IMPROVEMENT & CON-
TRACT COMPANY, &c., Defendants.

6075. Exceptions of Theodore Harris to the Deposition of J. A. Hilton.

76 The defendant, Theodore Harris, objects and excepts to the following portions of the deposition of J. A. Hilton, taken in New York city on March 28, 1894, to wit:

1. To the third, fourth, fifth, sixth, seventh, eleventh, twelfth, thirteenth and fourteenth questions, and to the several answers thereto, because said questions and answers are each and all incompetent as evidence against this defendant, and are irrelevant.

2. To the fourteenth question and answer thereto, because said answer purports to give only an extract from the minutes of the meeting of March 22, 1890, and does not give or purport to give the minutes of said meeting in full, and said extract is incompetent against this defendant.

3. To said deposition as a whole, because facts therein testified to are incompetent and irrelevant as against this defendant, a *bona fide* purchaser of a portion of said bonds for value without notice of the alleged facts testified to in said deposition; and

4. This defendant moves to suppress and exclude said deposition, because the facts therein testified to are incompetent and irrelevant as against this defendant, a *bona fide* purchaser of a portion of said bonds for value and without notice of said alleged facts testified to in said deposition.

BARNETT, MILLER & BARNETT,
Solicitors for Theodore Harris.

United States Circuit Court for the District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO
RAILWAY COMPANY, Plaintiff,

vs.

OHIO VALLEY IMPROVEMENT & CON-
TRACT COMPANY, &C., Defendants.

6075. Exceptions of Louis-
ville Banking Co. to the
Deposition of J. A. Hilton.

The defendant, Louisville Banking Company, objects and excepts to the following portions of the deposition of J. A. Hilton, taken in New York city on March 28, 1894, to wit:

1. To the third, fourth, fifth, sixth, seventh, eleventh, twelfth, thirteenth and fourteenth questions, and to the several answers thereto, because said questions and answers are each and all incompetent as evidence against this defendant, and are irrelevant.

77 2. To the fourteenth question and answer thereto, because said answer purports to give only an extract from the minutes of the meeting of March 22, 1890, and does not give or purport to give the minutes of said meeting in full, and said extract is incompetent against this defendant.

3. To said deposition as a whole, because facts therein testified to are incompetent and irrelevant as against this defendant, a *bona fide* purchaser of a portion of said bonds for value without notice of the alleged facts testified to in said deposition; and

4. This defendant moves to suppress and exclude said deposition, because the facts therein testified to are incompetent and irrelevant as against this defendant, a *bona fide* purchaser of a portion of said bonds for value and without notice of said alleged facts testified to in said deposition.

BARNETT, MILLER & BARNETT,
Solicitors for Louisville Banking Co.

The replication of complainant referred to is as follows :

Circuit Court of the United States, District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, Com-	}
plainant,	
vs.	
OHIO VALLEY IMPROVEMENT & CONTRACT COMPANY, &C., Defend-	}
ant.	

Replication of the complainant, The Louisville, New Albany & Chicago Railway Company, to the answer herein of the defendant, The Kentucky National Bank.

(Replication omitted by stipulation.)

And afterwards, to wit, on the 11th day of September, 1894, this cause came on to be heard, as to the defendants, The Ohio Valley Improvement & Contract Company, The Louisville Trust Company, W. C. Nones, Theodore Harris, The Louisville Banking Company, S. A. Cannon, William M. Charlton, A. Schwabacher, James A. Shuttleworth, W. A. Huston, W. H. Dillingham, S. F. Forrester, R. L. Whitney, B. A. Duerson, John T. Bate, Jr., John H. Leathers, A. J. Ross, Ronald Whitney, Allen R. White, Ben. C. Weaver, Kentucky National Bank, The Louisville Trust Company, assignee of Cornwall & Brother, and The Louisville Trust Company, assignee of William Cornwall, Jr., B. Hollman, Dennis Long, Vernon D. Price, John W. Stine and Bennett H. Young.

The complainant read upon the hearing the bill with the exhibits filed therewith, the supplemental bill filed January 28th, 1893, with the exhibits filed therewith, and the supplemental bill filed December 2nd, 1893, and exhibits therewith filed, and the replications to the several answers filed by the said defendants.

Complainant also read articles of consolidation between the Louisville, New Albany & Chicago Railway Company and the Chicago & Indianapolis Air Line Railway Company which was filed in court July 10th, 1894, under a stipulation between the parties.

Complainant also read upon the hearing the stipulation between it and the defendant The Ohio Valley Improvement & Contract Company, which said stipulation was filed February 16, 1891,

78 and also the stipulation between the complainant and the defendants, B. H. Young, B. Hollman, W. C. Nones, The Louisville Trust Company, W. H. Dillingham, John T. Bate, Jr., A. J. Ross, W. M. Charlton, A. Schwabacher, R. Whitney, M. A. Huston, John H. Leathers, Allen R. White, Ben. C. Weaver, S. F. Forrester, Kentucky National Bank and J. W. Stine, which said stipulation was filed May 8th, 1894.

Complainant also read under the last stipulation mentioned the affidavit of John A. Hilton, and the exhibits filed therewith, and also the deposition of said John A. Hilton with the exhibits therewith filed, which said deposition was filed in court March 28th, 1894.

Complainant also read depositions of H. V. Loving, Attila Cox, A. E. Richards, B. H. Young, L. V. Cassilly, Theodore Harris, William G. Wetterer filed in court March 25th, 1893.

The defendants read their several answers and the answer of the defendant, The Ohio Valley Improvement & Contract Company, def't Hollman by agreement read his answer as if it were a deposition. All of the defendants herein read under the terms of the stipulation hereinbefore mentioned the affidavits of William Dowd, John B. Carson, R. R. Hitt, Elibu Root, and Joel B. Erhardt; and also the deed from the National Bank of Cincinnati to the complainant; and the deed from Richard Giltenan to the complainant and a copy of the record in the cause of The Louisville, New Albany & Chicago Railway Company against John D. O'Leary, and a copy of the record in the case of Lizzie Woods vs. The Louisville, New Albany & Chicago Railway Company. And the defendant, The Louisville Trust Company, read the deposition of H. V. Loving; and the defendant, W. C. Nones, read his own deposition; and the following defendants read their own depositions in their own behalf: Burton A. Duerson, Allen R. White, M. A. Huston, A. J. Ross, J. A. Shuttleworth, W. H. Dillingham, S. A. Cannon, S. F. Forrester, A. Schwabacher, R. L. Whitney, John H. Leathers, John T. Bate, Jr., R. Whitney, Ben. C. Weaver, W. M. Charlton, Theodore Harris, and The Louisville Banking Company read said deposition of Theodore Harris in its behalf. And all of the defendants read the papers and documents mentioned and described in the written stipulation this day filed.

And the court being now advised filed its opinion and it is considered that the guaranty endorsed on the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company in the name of the complainant was so endorsed without authority, and
 79 the same is void; and the said defendants heretofore named are hereby directed to produce the bonds of the said Richmond, Nicholasville, Irvine & Beattyville Railroad Company in their possession, or in which they have an interest bearing the endorsed guaranty aforesaid of the Louisville, New Albany & Chicago Railway Company into the court, and the clerk of this court is directed to endorse upon each of said bonds the following entry: "The guaranty herein is cancelled by order of the court."

The said defendants are required to produce said bonds for purpose aforesaid in this court on or before the 15th day of October, 1894, and they and each of them are perpetually enjoined and restrained from selling, alienating or parting with the possession of any of said bonds until said guaranty has been cancelled in the manner hereinabove described.

It is further ordered, adjudged and decreed that the complainant recover of the several defendants herein its costs in this behalf expended, the cost of the taking of the deposition of John A. Hilton, which said deposition was returned in court the 25th of March, 1894, to be specially taxed against defendants Theodore Harris and The Louisville Banking Company, and not taxed against the other defendants.

The stipulation referred to is as follows:

United States Circuit Court for the District of Kentucky.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY }
 vs.
 THE OHIO VALLEY IMPROVEMENT & CONTRACT COMPANY. }

It is agreed and stipulated that on the hearing of this cause the defendants read a copy of a mortgage executed by the complainant, The Louisville, New Albany & Chicago Railroad Company, to the Farmers' Loan & Trust Company and W. M. Lewis dated March 24th, 1884, and which said mortgage begins with this recital:

"This indenture made and entered into this twenty-fourth day of March, one thousand eight hundred and eighty-four, by and between the Louisville, New Albany & Chicago Railway Company, a corporation duly created and existing under the laws of the State of Indiana and Kentucky, party of the first part, and the Farmers' Loan & Trust Company a corporation duly created and existing under the laws of the State of New York and W. M. Lewis of New Albany in the State of Indiana hereinafter called the trustee parties of the second part."

And also contains a description of the property embraced in said mortgage, a part of which description is as follows: "All the railway of the party of the first part in the city of Louisville in the State of Kentucky and extending from New Albany on the Ohio river and running through the counties of Floyd &c. in said State of Indiana and Jefferson county in said State of Kentucky."

And the defendants also read a copy of the lease executed by the Louisville Southern Railroad Company to the Louisville, New Albany & Chicago Railroad Company and which said lease contains the following provisions:

"This agreement, made the tenth day of December, one thousand eight hundred and eighty-eight, by and between the Louisville Southern Railroad Company, hereinafter designated the Southern Company, a corporation organized and existing under the laws of the State of Kentucky, party of the first part, and the Louisville, New Albany & Chicago Railway Company, a corporation organized and existing under the laws of the State of Indiana and of the State of Kentucky, hereinafter designated as the New Albany Company, party of the second part, witnesseth:

Whereas, the Southern Company owns and is operating a railroad in the State of Kentucky extending from Louisville, via Shelbyville, Lawrenceburg and Harrodsburg to Burgin, on the Cincinnati Southern railroad and by the terms of an agreement dated the 21st day of June, 1887, between said Southern Company and the Kentucky & Indiana Bridge Company, the said Southern Company has an entrance into the city of Louisville to a point of connection with the Short Route Railway Transfer Company and an extension of its line over the bridge of said bridge company to the Indiana line upon the terms and conditions set forth in said contract, a copy of which will be attached hereto as part hereof, and the New

Albany Company has constructed, owns and operates a railroad through Indiana which meets and connects as aforesaid with said Louisville Southern railroad at said Indiana line, and the New Albany Company desires to contract for the use of said Louisville

Southern railroad, and it is the mutual interest of the parties
81 to make a consolidation of business interests and franchises in the manner and to the extent herein set forth." And the defendants also read a mortgage executed January 1st, 1886, by the Louisville, New Albany & Chicago Railway Company, to the Farmers' Loan & Trust Company, John H. Barker, trustee, and which said mortgage contains the following provisions:

"This indenture, made and entered into this first day of January, one thousand eight hundred and eighty-six, by and between the Louisville, New Albany & Chicago Railway Company, hereinafter called the railway company, a corporation duly created and existing under the laws of the States of Indiana and Kentucky, party of the first part, and the Farmers' Loan & Trust Company, a corporation duly created and existing under the laws of the State of New York, and John H. Barker, of Michigan City, in the State of Indiana, hereinafter called the trustees, parties of the second part:

"Whereas, the party of the first part owns and is operating a railroad in the State of Indiana, which is composed of a line from New Albany, on the Ohio river, to Michigan City, on Lake Michigan, hereinafter called the main line, and a line from Indianapolis to a junction with the Chicago and Western Indiana railroad, at a point on the State line between Indiana and Illinois, about twenty miles southwest of Chicago, hereinafter called the air line, together with certain proprietary and leasehold interests in the franchises and railroad of the said Chicago and Western Indiana Railroad Company, and in the terminal facilities of the said company in the city of Chicago, and certain terminal rights, facilities and approaches in the other cities above mentioned, and in the city of Louisville, in the State of Kentucky, and between said city of Louisville, and in the city of New Albany:

"Now, therefore, this indenture witnesseth, that the Louisville, New Albany & Chicago Railroad Company, party of the first part, in consideration of the premises and of one dollar to it in hand paid, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, set over, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, assign, set over and release, convey, and confirm unto the Farmers' Loan & Trust Company and John H. Barker, parties hereto of the second part, and to the survivor of them, and to their successor or successors in the trust herein and hereby created and declared, all the railway of the party of the first part in the city of Louisville, in the State of

82 Kentucky, and extending from New Albany on the Ohio river to Michigan City in the State of Indiana, and from the city of Chicago in the State of Illinois, to the Indiana State line, under a leasehold right, and from said State line to the city of Indianapolis in the State of Indiana, including the railway lying and

being in all of said cities, and terminal rights and facilities and approaches thereto, the same being about four hundred and seventy-five miles in length, and running through the counties of Floyd, Clark, Washington, Orange, Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Stark, La Porte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton, and Lake, in said State of Indiana, and Jefferson county, in said State of Kentucky, and Cook county, in said State of Illinois."

And the defendants also read a copy of the record of a suit filed in Floyd county, Indiana, by Lizzie Woods *vs.* The Louisville, New Albany & Chicago Railroad Company and which record contained a petition by the said railroad company for the removal of the said action to the United States circuit court and which petition is as follows (which has been heretofore copied into this record).

And also another petition for the removal thereof filed in the said cause and which is as follows: (Has been heretofore copied into this record.)

And the defendants also read a copy of the record in the proceedings filed February 27th, 1887, in the Jefferson county court, State of Kentucky, by the complainant, The Louisville, New Albany & Chicago Railroad Company against John D. O'Leary to condemn for railway purposes certain real estate in the city of Louisville and State of Kentucky in which the following clause appears.

The Louisville, New Albany & Chicago Railway Company states that "it is a corporation and that it is duly empowered by its charter by an act of the General Assembly of the Commonwealth of Kentucky to purchase lease or condemn in said State such real estate as may be desired for railways &c. and to construct and operate a railroad in said State."

The said petition describes the land sought to be condemned as situated in the city of Louisville and State of Kentucky and such proceedings were had therein that the said land was condemned and the compensation paid therefor by the said complainant.

It is agreed that the foregoing extract contains all of such instruments and papers as is material and the remainder is omitted because it is immaterial.

ST. JOHN BOYLE,
Att'y for Louisville Trust Co. & W. C. Nones.
HELM & BRUCE,
For Complainant.

83	THE LOUISVILLE, NEW ALBANY & CHICAGO RAIL- ROAD COMPANY	} Opinion.
	<i>vs.</i>	
	THE OHIO VALLEY IMPROVEMENT & CONTRACT COM- PANY <i>et al.</i>	

The decision of Justice Brewer and Judge Jackson, after full consideration, that this court had jurisdiction of this cause and the granting of an injunction should, we think settle for this court some of the questions argued by counsel.

This decision determined that the complainant is an Indiana corporation and not a Kentucky one; hence, whatever authority the complainant had or has to guarantee the mortgage bonds issued by the R. N. I. & B. R. R. Co. is derived from the corporate powers granted by that State. It also determined that upon the then showing the complainant was entitled to an injunction to prevent the disposition by the O. V. I. & C. Company and others of the bonds of the Beattyville Railway Company with the guarantee of the complainants upon them. The subsequent orders entered by this court cancelling the complainant's guarantee on those bonds held by the Ohio Valley Contract Company were judgments against the validity of those guaranties but as those orders were made without discussion other than given the cause when the injunction was granted it is proper this court should consider the general question of authority to make those guaranties as well as the right of *bona fide* holders of the bonds for value without notice of any deficit in, or want of authority to execute the guaranty. This will be done briefly.

The consideration for the guaranty on the coupon bonds of the Beattyville Railway Company was to be the delivery of three-fourths ($\frac{3}{4}$ ths) of the capital stock of that railway company to complainant by the Ohio Valley Contract Company.

These bonds had been issued by the Beattyville Railway Company and were to be delivered to the contract company as the Beattyville Railway Company was constructed.

The guaranty which was endorsed on \$1,185,000 of bonds is as follows:

"For value received, the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within
84 bond the payment by the obligor therein of the principal and interest thereof, in accordance with the terms thereof. In witness whereof, the said railway company has caused its corporate name to be signed hereto by its president and its seal to be attached by its secretary."

The authority to guarantee the payment of mortgage coupon bonds of another railway company does not arise or can it be implied from the general business of complainant, either in constructing or operating its railroad, but is an authority which must be given to it as a railroad corporation by the State expressly or be clearly implied from other corporate powers granted to such a corporation.

The provisions of the Indiana statute upon the subject of guaranty of bonds of another company are as follows:

"3951a. Guaranty of bonds of another company.—The board of directors of any railway company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the State in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any ad-

joining State, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

"3951b. Petition of stockholders.—2. The petition of the stockholders specified in the preceding section of this act shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

"3951c. Limitation of the power.—3. No railway company shall, under the provisions of this act, indorse or guarantee the bonds of any such railway company or companies, as is above mentioned, to an amount exceeding one-half of the par value of the stock of the railway company so indorsing or guaranteeing as authorized under this act."

It is quite clear from this record that no effort was made by the board of directors of the complainant or any one else to conform to the provisions of this statute in regard to a petition of the holders of the majority of stock in complainant's company, and that the order of the board, directing the president and secretary to guarantee these bonds, was without the approval or petition of a majority or any of the stockholders. The provisions of the Indiana statute seem to have been ignored and the guaranty made
85 presumably under the supposed authority of an act of the State of Kentucky approved April 7th, 1882. But as complainant is not a Kentucky corporation this guaranty cannot be sustained or aided by this statute.

It will be observed that the board of directors are authorized by the Indiana statute quoted, to guarantee the bonds of another company only when and upon the petition of the holders of a majority of the stock of their company. The stockholders and not the board of directors are to take the initiative and a majority thereof determine whether there shall be a guaranty of the bonds of another company. The board of directors may decide whether a majority has petitioned them so as to authorize a guaranty, and may determine the manner of the endorsement of guaranty and the proper mode of executing the power given them by the petition of the holders of a majority of stock, but the authority does not exist except by and through the stockholders. The provision of this statute which requires the facts which are relied on to show the benefit accruing to the company endorsing or guaranteeing the bonds to be stated in the stockholders' petition, clearly shows the authority to guarantee the bonds of another company was not intended to be given the board of directors.

There is no question here as to the effect of a subsequent approval or ratification of the guaranty of these bonds by the board of directors, by the stockholders as their action was promptly repudiated by them the first meeting after the guaranty was made and presumably as soon as it was practical to have had a stockholders' meeting.

It is insisted that there are other provisions of the statute of Indiana which grant to railway corporations organized in that State

under its laws, corporate powers that authorize guaranties such as made here in the execution of those powers.

These powers are such as to consolidate with other railroad companies and to buy and lease by way of extension of their railway lines, other railroads, &c., but the authority to guarantee the bonds of another railroad company is given in express terms in section 3951 and the mode prescribed, and we think this precludes any implied authority arising to guarantee bonds in cases covered by that section in the exercise of other corporate powers given in other parts of the statute.

Those parts of the statutes might be pertinent to show corporate authority to buy the stock of the Beattyville Railway Company, but as the consideration thereof was the guaranty of the payment
86 of said company's coupon bonds, this guaranty could not be given by the action of the board of directors alone without the petition of stockholders as directed by section 3951.

In *Thomas vs. Railroad Co.*, 101 U. S., the Supreme Court by Justice Miller says:

"We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

And in the case of *The Central Transportation Co. vs. Pullman Palace Car*, 139 U. S. 48, Justice Gray, after reviewing the cases in the Supreme Court, says: "The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three grounds: the obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not — be subjected to risks which they have never undertaken; and above all, the interest of the public; that the corporation shall not transcend the powers conferred upon it by laws."

This court and the circuit court of appeals of this (6th) circuit have recently considered the question of the corporate right of the Kentucky Union Land Company to guarantee the payment of the coupon bonds of the Kentucky Union Railway Company and have sustained the land company's authority to make the guaranty, but this was upon a construction of the powers given in the charter of that company, especially the power to engage in the business of transportation and to consolidate with any railroad company chartered or to be chartered. See *Tod vs. Ky. Union Land Co.* 57 Fed.

Rep. 48. Marbury & Jones vs. Ky. Union Land Co. Oct. term, 1893.

The doctrine as announced by the Supreme Court through Justices Miller and Gray as to the extent and the limitations of corporate powers when applied to this case is, we think, conclusive, if
87 our construction of the Indiana statute is correct, against the right of the board of directors of complainant's company to enter into the contract of October 1889, and subsequently to guarantee the bonds of the Beattyville Railway Company. As between the complainant and the Ohio Valley Contract Company the guaranty on the Beattyville Railway Company is invalid. See also Pearce vs. M. & I. R. R. Co., 21 How. 441; Penn. Co. vs. St. Louis Alton &c., R. R. Co., 118 U. S. 307; Coleman vs. Eastern Counties Rwy. Co., 10 Beaven p. 1; East Anglian Rwy. Co. vs. Eastern C. Rwy. 11—C. B. 775; Davis vs. Railroad Co. 131 Mass. 258; Marble Co. vs. Haney 92 Tenn.

Many of the defendants are *bona fide* purchasers and holders of these bonds having bought them on the market for full value with the guaranty upon them and without knowledge or notice of the want of authority by complainant's board of directors to have the guaranty made; and they insist the guaranty is not invalid as against them and should not be cancelled.

The first inquiry upon this branch of the case is the relation which these bondholders have to the guaranty. The guaranty is in terms "to the holder of within bond" and although the Ohio Valley Contract Company was at the time of the endorsement the holder of some of said bonds and the guaranty was made under a contract with that company which was to deliver three-fourths of the capital stock of the Beattyville Railway Company as the consideration thereof, it was evidently the intention of the parties that the guaranty was to be to whoever might be the holder of bond. The guaranty was intended to pass with the bond and such is the legal effect of the endorsement.

But it is insisted that although the legal title to this guaranty passed with the ownership of the bond upon which it is endorsed, yet, by the provisions of the Kentucky statute, the guaranty is subject to the same defenses as exist against the Ohio Valley Contract Company.

The provisions of the Kentucky statute are as follows:

"All bonds, bills or notes for money or property shall be assignable so as to vest the right of action in the assignee, but, except in case of bills of exchange, not to impair the right to any defense, discount or offset that the defendant has or might have used against the original obligee, or intermediate assignor before notice of the assignment."

Another provision of the statute is as follows:

"Whenever a promissory note is made by the obligor payable to himself or to his order, and is signed on the back thereof by
88 the said obligor and then delivered such signature and delivery shall operate as a promise to pay the face of the note at maturity to the party to whom it shall have been delivered, and

such party may fill up the blank with words of promise, and recover thereon in the same manner as if such party had been named as payee in the note, and such note shall be assignable as are other promissory notes.

Every person who shall sign his name upon the back of a promissory note shall be deemed and treated as an assignor as to the party holding it, unless in writing a different purpose is expressed; the note can legally be placed upon the footing of a bill of exchange." Gen'l Statute chap. 22; sec. 6-13 and 14.

The Code of Practice, section 19, provides, "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any defense, set-off or defense now allowed * * *. This section does not apply to bills of exchange, nor promissory notes placed upon the footing of bills of exchange, nor to common orders or checks."

These are the only provisions touching the question under consideration. These provisions apply only when an assignment is necessary to pass the title to the thing in action.

That is where the bill, bond or note had an obligee other than the party suing and from whom he gets his right of action and — whose name the suit would be brought except for the provisions of the law.

But here the guaranty is not to the Ohio Valley Contract Company or to the order of that company. The obligation of the guaranty is in terms to the holder of each bond and it is to that holder the principal and interest of the bond is guaranteed to be paid if the obligor defaults.

These bonds were intended by the parties to be placed upon the market and sold and they passed to a purchaser by delivery and not by virtue of the statute of assignments enacted by Kentucky. This is by the general commercial law—*City of Lexington vs. Butler*, 14 Wall 382.

The title to the obligation of guaranty passed with the bond without assignment under the statute, because the guaranty was to whoever might be the holder thereof and the holder was, by a *bona fide* delivery. There is no need, therefore, of an assignment under the provisions of the Kentucky statutes. Thus, as no assignment was necessary and there being no assignment, the statute authorizing assignment with reservations as to defenses, &c., 89 as against an original obligor, has no application. An assignment of the thing in action is necessary only when there can be an original obligee other than the party suing.

This guaranty, if valid, does not place the complainant in the position of a second maker on the Beattyville Railway bonds, nor does it place the company in the position of an endorser of a bill of exchange, but the position is somewhat analogous. An endorser of a bill of exchange agrees to pay if the parties previously bound thereon do not, and he is given legal notice of the default, and here the complainant guarantees the obligor will pay principal and interest of the bond according to its terms.

It is quite unnecessary to review the conflicting authorities upon

this subject. We conclude that as the bonds passed by delivery and the obligation of the guaranty pass with the bonds, the provision of the Kentucky statute of assignments as to defenses, etc., do not apply. We concur in what was said by Justice Matthews in *Davis vs. Wells*, 104 U. S. "That notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse." Page 169.

Although this guaranty passed with the bond upon which it was endorsed and inured to the benefit of the holder thereof, the question remains whether the guaranty is valid and enforceable in the hands of a *bona fide* holder for value without notice of the want of authority in the board of directors and its president to make the guaranty.

There are no recitals in this guaranty other than that it is given "for value received," and there can be no estoppel or presumption against the complainant corporation in favor of innocent holders other than that which may arise from the guaranty itself, and the fact these bonds were put upon the market with the guaranty upon them with the consent of the board of directors of complainant.

The guaranty of such bonds was not within the scope of the business of operating a railway, nor could the corporate power to thus guarantee the bonds of another railway company constructing railway in another State be inferred from the usage of railway companies.

The nature of the contract should have been notice to all purchasers to inquire into the corporate powers of the guaranteeing railway company, as it was unusual and outside of the ordinary business of a railway company either in operating or constructing railroads.

90 Purchasers on the bond market were bound to know that the president and board of directors of complainant were not the corporation but its agents, and that the corporate power to guarantee these bonds did not ordinarily exist in the directory. There were no recitals either in the resolution of the board of directors or in the guaranty itself to mislead the purchaser or stay inquiry.

The commercial character of the bond and guaranty thereon did not relieve a purchaser from the risk of the want of corporate authority to execute the guaranty.

In speaking of notes and bonds issued or accepted by an agent, acting under a general or special power, the Supreme Court says: "In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally." See

Floyd Acceptances, 7 Wall., 676, and approved in March *vs.* Fulton County, 10 Wall., 683.

It is insisted that as the board of directors of complainant's company had the corporate authority to guarantee these bonds under certain circumstances, these innocent purchasers had a right to presume the necessary conditions existed to confer the authority upon them.

The language of Justice Swayne in *Merchants' Bank vs. State Bank*, 10 Wall., is quoted as a general proposition applicable to all contracts with corporations. Justice Swayne said: "Where a party deals with a corporation in good faith; the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in part exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."

This language is applicable as in that case where the company had the corporate authority to make the contract and the agent who made it was within the general scope of his duties, though not especially authorized to make the contract in controversy, but it cannot be true, broadly stated, else stockholders in corporations

91 would be without the protection of limitations and conditions placed upon their corporation by the charter and the State itself would be without the power to prescribe conditions to the exercise of corporate powers or prescribe the mode or agencies by which corporate powers should be exercised.

Here the condition upon which the board of directors had the authority to make the guaranty of the mortgage bonds of another railway company was the request of a majority of the stock of complainant's company and this was to be in the shape of a written petition and the reasons therefor were to be given.

This condition, precedent to the corporate authority of the board of directors, was not performed or attempted to be performed. It may be the board of directors might have had the right to determine whether if a petition of stockholders had been presented it was as required by the statute; as to the number of stockholders and the character of the petition. But there was no action of stockholders at all and there was no recital in the resolution of the board or in the guaranty that there was. We do not, therefore, see that the position of these bondholders who are *bona fide* purchasers without notice is other or different from that of the Ohio Valley Company.

It is earnestly contended that in the instance where the Cleveland, Columbus & Cincinnati Railroad Company guaranteed the payment of the bonds of the Columbus, Piqua & Indiana Railroad Company the Supreme Court has decided the other way in *Zabreskie vs. Cleveland, Columbus & Cincinnati R. R. Co.*, 23 How., 381.

There the contest was between a stockholder of the C. C. & C. R. R. Co. and the *bona fide* holders of the guaranteed bonds. The

stockholder seeking to enjoin the payment of the interest on the bonds guaranteed by the guarantor, the C. C. & C. R. R. Co.

There was an effort to sustain the stockholder's suit by allegation of misconduct of one or more of the directors of the C. P. & I. R. R. Co., but the real objection to the guaranty was an alleged want of authority, as the stockholders did not assent thereto by a two-thirds vote before the contract of guaranty was entered into as was required by the statute under which the C. C. & C. R. R. Co. was organized.

It appeared in that case the contract under which the guaranty was to be made, was entered into in March, 1854, and that in the summer of (July) 1854 at a called meeting of the stockholders of the C. C. & C. R. R. Co. the endorsement of guaranty was expressly approved by the stockholders without a recorded dissent. The suing stockholder was present by proxy who verbally dissented, but declined to vote, although his vote would have controlled the meeting.

After this stockholders' meeting these bonds were sold in the market "under an uncontradicted representation of their validity through the votes" at the stockholders' meeting and the bonds were freely purchased upon the representation of the action of the stockholders.

There was no action of the stockholders of the C. C. & C. R. R. Co. repudiating the action of the company in making the guaranty, nor did the suing stockholder take any action to notify or repudiate the action of his company until the fall of 1856 and after the C. P. & I. R. R. Co. had become insolvent. He, in his suit, denied any efficacy to the vote of the stockholders in July, 1854, because the notice was insufficient as to time of notice and the failure to state its purpose and he contended that not more than half of the stock was represented and two-thirds of those that were present did not vote. The court refused to sustain this stockholder's injunction under the circumstances and Justice Campbell in the course of his opinion said: "The observations of Lord St. Leonard's in the House of Lords, (*Bargate vs. Shortridge*, 5 H. L. Ca., 297), in reference to the effect of the conduct of a board of directors as determining the liability of a corporation, are applicable to this corporation, under the facts of this case. 'It does appear to me,' he says, 'that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this sort, these directors cannot after five or six years have elapsed, turn round, and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained the matter. * * * The way, therefore, in which I propose to put it to your lordships, in point of law, is this: The question is not whether that irregularity can be considered as unimportant, or as being different in equity from what it is in law, but the question simply is, whether, by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard in a court of justice to

set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do."

This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons
93 dealing with a company must take notice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court, and has been engrafted upon the common law of Ohio. *Pearce vs. M. & J. R. R. Co.*, 21 How., 441; *Strauss vs. Eagle Ins. Co.*, 5 Ohio, N. S. 59. But the principle includes those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard."

In that case the stockholders' meeting had been held and proper resolution by unanimous vote—so far as the record showed—passed, and the bonds had been sold upon the representation of that vote, taken when the suing stockholder was present by proxy. Certainly the buyers of these bonds should not have been bound by facts which were not in the record and which contradicted the record upon which the bonds were sold. The fact that the suing stockholder was present by proxy and refused to put on the record his dissent which would have been decisive, would of itself — been sufficient to prevent his obtaining the relief he sought.

But construing the language of the court in its broadest acceptance and apply- it to the case at bar it is only to the effect, that had there been a petition by stockholders, presented to the board of directors of complainant's company directing this guaranty and that board had acted as directed,—reciting a majority had petitioned—the question of its compliance with the statute as to the reasons given or the number of stockholders petitioning would not be thereafter opened to inquiry as against *bona fide* purchasers.

The case of *Toppan vs. The C. C. & C. R. R. Co.*, reported in 1st Flippin 75, is also much relied on by defendants' counsel. That case arose on the same guaranty of the bond of C. P. & I. R. R. Company mentioned in case of *Zebriske vs. C. C. & C. R. R. Co., et al., supra*. The action was at law by a bondholder of the guaranteed bonds for the interest thereon against the C. C. & C. R. R. Company.

The opinion of Judge Willson of the northern district of Ohio was upon a demurrer to the declaration. One of the objections urged was that the guaranty was not negotiable and the holder of the bond could not sue and recover thereon.

Another was that the defendant, having no power in its charter to make the guaranty, the legal authority and the facts and circumstances contemplated by the general act of 1852, by which such power could be exercised should be fully set out in declaration.

94 The learned court decided that the guaranty was negotiable and passed with the bond upon which it was endorsed. He also decided that the allegation in the declaration that "said guar-

anty was duly signed by the defendant by its then president, who was authorized to execute the same, and was afterwards to wit, etc., duly ratified and confirmed by the stockholders of said company" was sufficient. The latter ruling raised the question of the materiality under the law of 1852 of the time when two-thirds of the stockholders assented to the guaranty.

The statute of 1852 gave to railroad companies authority to aid, &c., other railroads when certain facts and circumstances existed and had the proviso—"that no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each of said companies shall have been called by the directors thereof at such time and place, and in such manner as they shall designate, and the holders of at least two-thirds of the stock of such companies represented at such meeting in person or by proxy, and voting thereat, shall have assented."

The court, in discussing the point, used language, which when disconnected from the case, is quite broad, but held the allegation of the declaration was sufficient and that the time of the assent of two-thirds of the stockholders was not material. It appeared in that case that the action of the directory in making the guaranty had been ratified by the stockholders. The extent of this decision is that the assent of two-thirds of the stockholders to the aid as given might be given after the aid as well as before.

That law provided for the arrangements and agreements to be made by the directors of the respective railroad companies and for them to call the stockholders together at such time, place and manner as they should determine, and then the action or proposed action of the directors should be assented to and was to be before the aid was furnished or the purchase, lease or arrangement was perfected. In that instance all arrangements and agreements and the initiative was to be taken by the directors and in fact, as is stated in the *Zabriske* case by Justice Campbell, the bonds with the guaranty upon them were not put upon the market until after the stockholders had assented to the guaranty. It is not intended to state the stockholders assented to the guaranty before the guaranty was endorsed upon the bonds but before they were put upon the market.

95 In the case at bar, the initiative was to be taken by the stockholders and they were to determine whether there should be a guaranty and direct the directors by a petition in writing giving the facts upon which they based their determination. This extraordinary corporate power was to be exercised by the stockholders themselves, and not by their agent, the board of directors, and in a way and manner that all who dealt with the corporation could know if they desired. These two cases, both in *principal* and facts, fall far short of the present case.

This view makes it unnecessary to consider and determine whether all of the defendants are *bona fide* holders of these bonds without notice of the facts which make the guaranty invalid.

The complainant is entitled to have its injunction sustained and

the guaranty on defendants' bond cancelled and a decree will go accordingly.

Complainant's proof is as follows:

The affidavit of John A. Hilton and exhibits therewith are as follows:

Circuit Court of the United States, District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY	} In Equity.
COMPANY	
<i>vs.</i>	
OHIO VALLEY IMPROVEMENT & CONTRACT COM-	
PANY <i>et al.</i>	

STATE, CITY, AND COUNTY OF NEW YORK :

John A. Hilton on oath says that he is now and has been since May, 1889, the assistant secretary and treasurer of the complainant in charge of its New York office, books and papers.

Affiant was present at the special meeting of the board of directors of complainant which met on October 8, 1889. The only directors present were Messrs. Dowd, Carson, Cook, Erhardt, Fetter, Hitt, Postlethwaite and Root.

At such meeting the record shows the following proceedings were had :

"The president laid before the board a proposal submitted by Mr. A. E. Richards, president of the Ohio Valley Improvement & Contract Company for a transfer to this company of three-fourths of the entire capital stock of the Richmond, Nicholasville, Irvine &

Beattyville Railroad Company for a consideration of the
 96 guaranty of the principal and interest of the bonds of said company by this company in accordance with the following proposed agreement :

"On motion of Mr. Cook seconded by Mr. Hitt, it was resolved that this company will guarantee the principal and interest of said bonds upon the terms proposed and that the president or vice-president and assistant secretary of this company be and they are hereby authorized to execute and deliver said agreement under the seal of this company."

Affiant says that the paper herewith filed marked "A" is a true copy of the original proposal made by A. E. Richards as president of the said improvement & contract company, and under the instruction of President Dowd copies thereof were sent to Vice-President Carson and others.

Affiant from time to time examined the original subscription paper which was kept by President Dowd in his office at the Bank of North America, and affiant copied the same and checked off the names of those subscribing for bonds and the several amounts taken and also at the request of said Dowd affiant made the calculations of the first partial payment on such subscriptions. Affiant attaches hereto a copy of such subscription paper together with the names

and amounts attached as B. Affiant also attended to properly sending out to the several subscribers a notice asking the first payment. A copy whereof is herewith filed as C.

On March 11, 1890, after three o'clock p. m., affiant was requested to go to the Bank of North America by President Dowd to seal and attest 585 guarantees on the back of that number of bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, which was done that afternoon, in the presence of said Richards and the said bonds with such guarantees were left with the Bank of North America.

Affiant knows the signatures of William Dowd, John B. Carson and A. E. Richards and annexes hereto copies of divers letters and telegrams taken from the original letters and telegrams and letterpress books belonging to the company and on file in its office.

JOHN A. HILTON.

STATE, CITY, AND COUNTY OF NEW YORK, ss:

John A. Hilton, being duly sworn, says that the affidavit by him above subscribed is true.

Witness my hand and official seal this April 19, 1890.

[SEAL.]

GEORGE H. TAYLOR,

Notary Public, N. Y. Co. (9).

97 Exhibit "A" referred to in the foregoing affidavit has heretofore been copied on page 29, being marked Exhibit "B" filed with the original bill of complaint, and is not here repeated.

Exhibit "B" referred to in Hilton's affidavit is as follows:

The Ohio Valley Improvement and Contract Company offers for sale eleven hundred and twenty-five (1,125) six per cent. first-mortgage thirty-year bonds of \$1,000 each, dated July 1st, 1889, of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, principal and interest to be guaranteed by the Louisville, New Albany & Chicago Railway Company, at 90 cents on the dollar and accrued interest. The delivery to be made as the bonds are endorsed, pursuant to the contract with the Louisville, New Albany & Chicago Railway Company, Ohio Valley Improvement & Contract Company, by A. E. Richards, president.

The undersigned, severally and each for himself agree to take and pay for at the foregoing price the number of bonds set opposite their respective names:

Names of subscribers.	No. of bonds.
Robert H. Hitt.	100
H. H. Cook.	25
James Roosevelt.	20
Elihu Root.	100
D. H. Houghtaling.	25
J. M. Fetter.	100
Geo. M. Pullman.	100
John B. Carson.	100

J. S. Bryce.....	10
Carroll S. Bryce.....	6
Wm. Dowd ..	70
Walter Howe	10
C. H. White & Co.....	79
D. G. Rollins.....	10
S. H. Wales.....	20
Wales & Co.....	320

Total..... 1,125 bonds.

Exhibit C, with Hilton's affidavit, is as follows:

Three hundred thousand dollars of the R. N. I. & B. R. R. Co.'s bonds guaranteed by the L. N. A. & C. Railway Co., are ready at the Bank of North America, 25 Nassau St., New York city, for delivery to the syndicate of which you are a member. This is a fraction over one-fourth of the total. Your subscription was for 100,000 bonds; and bonds amounting as near as may be to your proportionate share, say 25,000 bonds of \$1,000.00 each will be delivered to you upon the payment of the purchase price with accrued interest on or before the 15th of January next. If payment is made before January 1, 1890, the accrued interest will be from July 1, 1889. If payment is made on or after January 1, 1890, the bonds will be delivered without the January coupons and accrued interest will be from January 1, 1890. Checks should be made payable to the order of the Bank of North America.

Yours respectfully,

— — —, *Cashier.*

NEW YORK, *June 13, 1889.*

James Roosevelt, care of train-dispatcher, Del. & Hudson R. road, Albany, N. Y. (who will please forward):

Can you meet Mr. Carson and Judge Richards here tomorrow in relation to railroad matters in Kentucky. Say when you can come. Important.

(Signed)

WM. DOWD, *Pres't.*

Telegram.

W 628 N Y ED MY 52 DH

Received at Chicago, Ill., June 26, 1889.

Dated New York, 26.

To John B. Carson, vice-pres't L. N. A. and C. R. R., Chicago:

I shall be out of town from June twenty-eighth until July ninth. Telegrams will reach me if sent to New York office. Mr. Hitt is much pleased with Judge Richards' scheme, and will take an interest. Mr. Roosevelt is to get a man to go to Kentucky and make examination of enterprise.

WM. DOWD, *Pres't.*

2.44 p. m.

(By stipulation pages 345 to 371 are omitted.)

99 The deposition of John A. Hilton is as follows:

In the Circuit Court of the United States for the District of
Kentucky.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY CO. }
vs. }
OHIO VALLEY IMPROVEMENT AND CONTRACT CO. *et al.* }

JOHN A. HILTON, a witness called on behalf of the plaintiff herein, and residing at Jersey City heights, New Jersey, more than 100 miles from the place where this cause is to be tried, being duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, and being carefully examined deposes and says as follows:

Q. What is your name, age, residence and occupation?

A. My name is John A. Hilton. I reside on Jersey heights, New Jersey. I am fifty-seven years of age. I am assistant treasurer and assistant secretary of the plaintiffs herein.

Q. How long have you occupied those positions of assistant treasurer and assistant secretary?

A. Since May 1889.

Q. You have heretofore given an affidavit in this case which was sworn to by you on April 19, 1890, with which you filed: First. A copy of a proposition signed by the Ohio Valley Improvement and Contract Company by A. E. Richards president. Second. A copy of a list of subscribers to the bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Co. Then copies of a series of letters and telegrams, all of which copies are attached to your affidavit now on file in this case in this court. Will you please state whether these copies are true and correct copies of the originals from which they purport to be taken?

A. They are.

Q. Will you please by reference make the affidavit aforesaid with the copies aforesaid a part of your deposition?

A. I do by reference thereto.

Q. Have you recently read that affidavit?

A. I have.

Q. Are you ready to reaffirm all the statements therein contained?

A. I am.

100 Q. Was the endorsement of the guaranty placed upon the bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Company by the complainant's officers ever petitioned for or requested by the stockholders of the complainant?

A. No, it was done on the sole authority of the directors.

Q. Do you remember the date of the first stockholders' meeting after the endorsement?

A. March 12, 1890.

Q. Can you state the dates upon which eleven hundred and eighty-five bonds of the Richmond, Nicholasville, Irvine and

Beattyville Railroad Company were endorsed by the complainant under the assumed authority of its board of directors?

A. Six hundred of these bonds, numbers from one to six hundred inclusive, were guaranteed during the month of December, 1889, and five hundred and eighty-five of them, numbered from six hundred and one to eleven hundred and eighty-five inclusive on March 11th, 1890, the day before the annual meeting of the stockholders of this company.

Q. You may now state whether the annual meeting of stockholders convened March 11, 1890, adjourned to any particular time, if so, what?

A. The meeting of stockholders adjourned to March 22d, 1890.

Q. Before the adjournment was a new board of directors elected?

A. Yes.

Q. Can you state whether or not the president for the year before made a report to the stockholders showing the existing condition of the road and with some detail the obligations and alleged contracts of the road?

A. The minute book shows that William Dowd, who was the president at that time, presented a resume of the operations of the road for the last year, and that thereupon it was resolved that when the meeting adjourned it should be to the 22d of the month to take into consideration matters indicated in the president's report as to the leased lines in Kentucky; such adjournment being made to enable the stockholders to obtain further information as to such leases before acting upon any ratification or rejection thereof.

Q. Do you know whether the newly made directors made a detailed report with recommendation to the adjourned stockholders' meeting held on the 22d March, 1890?

A. Yes, they did.

101 Q. Will you please make an extract from the minutes of the stockholders' meeting covering their action in reference to the guaranty placed upon the bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Company, by the officers of the complainant and file said extract as a part of your deposition?

A. I have had such an extract made which is an accurate transcript from the minute book, which is as follows:

Extract from the minutes of the stockholders' meeting of the Louisville, New Albany and Chicago Railway Company, held 22nd of March, 1890, being an adjourned meeting from the 12th of March, 1890.

On consideration thereof the following resolutions on motion of Mr. Bumstead were adopted 32,741 votes in favor of same and 12,313 against.

Whereas, the stockholders of the Louisville, New Albany and Chicago Railway Company have this day heard and considered the report and recommendations of the board of directors submitted by their order of March 21st, 1890,

Be it therefore—

Resolved, That the stockholders of this company do adopt and ratify such report and suggestions and they do hereby reject and refuse to adopt or confirm the several agreements mentioned in such report as having been made without legal authority and the approval of the stockholders. The agreements so made without authority, and hereby rejected are as follows :

A contract with the Kentucky and Indiana Bridge Company dated July 19th, 1889.

A contract with the Louisville Southern Railroad Company dated October 19th, 1889, concerning the lease of its Lexington extension.

A contract with the Ohio Valley Improvement and Contract Company, dated October 9th, 1889.

The pretended guaranty of this company placed on \$1,185,000 of the bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Co.

Resolved also

The board of directors is hereby vested with full power to take all such proceedings, legal or otherwise, as they may be by counsel advised, are necessary or proper to cancel all such contract and guaranty and relieve this company from all obligations or liability by reason thereof.

The same is filed with my deposition as "Exhibit J. A. H. No. 1."
JOHN A. HILTON.

102 Subscribed and sworn to before me this 28th day of March,
1894.

[SEAL.]

JOHN P. BUTLER,

U. S. Commissioner for the Southern District of N. Y.

The deposition of H. V. Loving, &c., taken on the 20th day of Feb., 1893, on behalf of the complainant, is as follows :

H. V. LOVING being duly sworn and examined by Mr. Crawford, as attorney for the complainant, deposed as follows :

Q. Please state your name, residence and occupation.

A. H. V. Loving; Louisville, Ky.; president of the Louisville Trust Co.

Q. Is that the same corporation that is a defendant in a suit in the circuit court of the United States for the district of Kentucky, brought by the Louisville, New Albany and Chicago Railway Co. against the Ohio Valley Improvement and Contract Co. ?

A. It is.

Q. How long have you been president of the Louisville Trust Co. ?

A. Since its organization in 1884.

Q. Is the Louisville Trust Co. the owner of any bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Co. ?

A. It holds a large number of those bonds as collateral on loans made to the company.

Q. Do you know the number of bonds so held by the Louisville Trust Co., as collateral, and the serial numbers of such bonds, the same being known as endorsed bonds or guaranteed bonds of the complainant in this litigation? If so I will ask you to kindly state how many of those guaranteed bonds the Louisville Trust Co. holds as collateral, and the serial numbers thereof.

A. They hold as collateral 336 bonds endorsed or guaranteed by the Louisville, New Albany and Chicago Railway Co., thirteen of them are numbered from No. 768 to No. 780 inclusive; forty-one are numbered from No. 798 to No. 838 inclusive; one hundred and fifteen are numbered from No. 891 to No. 1005 inclusive; thirteen are numbered from No. 1008 to No. 1020 inclusive; one hundred and fifty-four are numbered from No. 1022 to No. 1175 inclusive; making a total of 336 bonds of \$1,000 each.

103 Q. These 336 bonds bear upon them do they, the guarantee of the Louisville, New Albany & Chicago Railway Co.?

A. They do.

Q. Did your trust Co. receive all these bonds as collateral at one time, and on one transaction, or at different times?

A. We received them at different times and on different transactions as collateral security on different amounts loaned.

Q. Please state when was the earliest of these transactions, and what bonds it covered?

A. The first endorsed bonds that we received I believe was on January 16th, 1890. We then received one hundred and twenty-five of those endorsed bonds as collateral on a loan to the Ohio Valley Improvement and Contract Co., on a note of the Ohio Valley Improvement and Contract Co., said bonds being numbered from 1151 to 1175 inclusive. That is the only date that I can give you unless I go downstairs.

Q. Were the other transactions where you received these endorsed bonds subsequent in point of time to the one you have indicated?

A. I believe that is the first batch of endorsed bonds we received.

Q. Is it not a fact that when you received those bonds as collateral on the note of the Ohio Valley Improvement and Contract Co., that those bonds were not then guaranteed by the New Albany Railroad Co., but that they were sent to New York for the purpose of being guaranteed after they had been hypothecated to your trust Co.?

A. My recollection is that they were guaranteed at that time. It is possible that you may be correct about it, though I am not of that impression. I think they were endorsed at that time.

Q. The Louisville Trust Co. is the assignee of Cornwall & Bros., is it not?

A. It is.

Q. Have you any of the bonds of the Beattyville railroad endorsed by the Monon Co., as assignee of Cornwall & Bros. or are those unendorsed bonds?

A. We hold a lot of those bonds, but I am not able to say whether they are endorsed or not.

Q. I assume that you will make the same answer with regard to Win. Cornwall, Jr.?

A. Yes, sir.

Q. Your company holds besides these 336 bonds, also a lot of 235 unindorsed bonds do they not?

A. Yes, sir, we do.

104 ATTILLA Cox, being duly sworn and examined by Mr. Crawford for the complainant, testified as follows:

Q. Please state your name, residence and occupation?

A. Attilla Cox; Louisville, Ky.; president of the Columbia Finance & Trust Co.

Q. Does the Columbia Finance & Trust Co. hold as owner collateral or otherwise, any of the bonds of the Richmond, Nicholasville, Irvine & Beattyville R. R. Co.; endorsed by the Louisville, New Albany & Chicago R. R. Co.?

A. No, we have no endorsed bonds in any capacity.

Q. You hold 75 and 68 unindorsed bonds do you?

A. I could not say the amount of bonds. I have had no information as to what this interrogation was to be, and did not get any information.

Q. Your company does not hold any unindorsed bonds as owner, pledgee or otherwise?

A. No, sir. We did hold 75 bonds at one time as collateral.

Q. Were those guaranteed bonds?

A. No, sir.

Q. Your company never held any endorsed or guaranteed bonds?

A. No, sir.

A. E. RICHARDS being duly sworn and examined by Mr. Crawford for the complainant deposed as follows:

Q. Please state your name, residence and occupation?

A. My name is A. E. Richards; residence Louisville, Ky.; occupation lawyer.

Q. Were you president of the Ohio Valley Improvement and Contract Co., which is a defendant in the suit in which these depositions are taken?

A. I was elected president of that company in October, 1888, and am still president.

Q. Are you familiar with the issue of the first-mortgage bonds of the Richmond, Nicholasville, Irvine and Beattyville R. R. Co. and the endorsement of 1,185 of such bonds by the Louisville, New Albany & Chicago Railway Co., the complainant herein.

A. I was not an officer of the railroad Co. when the bonds were issued. They came into the hands of the Ohio Valley Contract Co., after their issue.

Q. Were you not personally present in New York when the guarantee was endorsed upon the back of those 1,185 bonds issued by the railroad Co.?

105 A. I don't remember whether I was present when the first 600 were endorsed, but I was when the last 585 were endorsed.

Q. The first 600 endorsed were bonds numbered from 1 to 600, both inclusive, were they?

A. Yes, sir.

Q. You don't recollect whether you were there or not?

A. I do not know now. If it is a matter of importance I could possibly run it back and see.

Q. Do you remember about when the guarantee was actually endorsed on those bonds numbered from 1 to 600 inclusive?

A. I have no personal recollection beyond the answer filed by the Ohio Valley Improvement and Contract Co., in this case, in which I see it is alleged to have been in December of 1889.

Q. Do you remember when the remaining 585 bonds were actually endorsed with the guarantee of the complainant company?

A. I know that they were endorsed in March, 1890, and the answer of the company fixes it as the 11th of March, which I assume is correct.

Q. You were in New York, were you not, when they were endorsed, and witnessed the endorsement?

A. I was in New York when they were endorsed, and was present a part of the time while they were being endorsed.

Q. The 585 bonds endorsed on March 11th, 1890, were numbered were they not from 601 to 1185 both inclusive?

A. Yes, sir.

Q. Do you now, or did you ever own or hold in trust, or as collateral or otherwise, any of the bonds of the Beattyville Co., bearing thereon the endorsement or guarantee of the Louisville, New Albany & Chicago Railway Co.?

A. Yes, sir; I bought four of them either in January or February, 1890, and borrowed the money to pay for them from the Kentucky National bank, and pledged those bonds for collateral security. I paid off all the loan except \$500, and the bonds are still pledged for that.

Q. Do you recollect the numbers of those four bonds?

A. No, sir. I do not. They were of the first 600.

Q. Please state the serial numbers of the four bonds which you so purchased?

A. I have enquired at the bank and they are numbered as follows, 297, 298, 299 and 300.

106 Q. I observe by exhibit on file with the foreclosure suit against the Beattyville road, in which you are counsel for The Central Trust Co., complainant, that you signed a declaration declaring a number of the bonds to be due, and signing for fifteen and one-third bonds. Did that signing embrace the four bonds about which you have just testified?

A. Yes, sir.

Q. Were the other eleven and one-third bonds unguaranteed and unindorsed?

A. Yes, sir.

Q. You hold and own the same four bonds that you purchased some time after January, 1890, out of the first 600 endorsed?

A. I own them subject to the pledge of the Kentucky National bank.

Q. You never held any more, and still hold these?

A. That is all.

Q. From whom did you purchase those four bonds?

A. From the Ohio Valley Improvement & Contract Company.

Q. Of which you are president?

A. Yes, sir.

Q. How many bonds of the Beattyville Company does the Ohio Valley Improvement & Contract Co. now hold?

A. Well, early in December, 1892, the Ohio Valley Improvement & Contract Co. made a general assignment of all its assets for the benefit of its creditors, naming the Louisville Trust Co. as assignee. I could approximate the number of bonds that were turned over as unpledged, but it would only be speaking from recollection. I did not keep the books, nor superintend the keeping of the books. We had a secretary and treasurer who in connection with the book-keeper took charge of that part of our work. I very seldom ever looked at the books.

Q. At the time that the Ohio Valley Improvement & Contract Co. made an assignment to the trust Co., did it own or turn over under the assignment any of the Beattyville R. R. Co.'s bonds endorsed by the New Albany R. R.?

A. It did not deliver to the Louisville Trust Co. under that assignment any of the bonds that were so endorsed, but of course the assignment covered the contract Co.'s right, title and interest in all the endorsed bonds that had theretofore been pledged to different parties for loans and debts.

Q. But physically it turned over none?

A. It turned over none.

107 Q. Before the assignment of the Ohio Valley Improvement & Contract Co. the Ohio Valley Improvement & Contract Co. had surrendered in this court in this case had it not, 168 bonds, or about 168 bonds, for the cancellation of the guarantee of the complainant, had it not?

A. My understanding was, through Col. Bullitt, one of the attorneys for the contract Co., that all of the bonds of the Ohio Valley Improvement & Contract Co., held by them unclaimed, that were endorsed by the complainant, were surrendered in court and the endorsement cancelled.

Q. And from that time forward it only held unindorsed bonds in its own custody, and then its interest in the hypothecated endorsed bonds?

A. That is all. It was my instruction to the secretary and treasurer and to the book-keeper that the injunction of the court in this case was to be strictly obeyed; that they were not to handle or dispose of any of the bonds that were endorsed, after that injunction was issued. So far as I know those instructions were rigidly carried out.

Q. Do you recollect the number of bonds which were signed for by the Ohio Valley Improvement & Contract Co., in the declaration made on the Central Trust Co. declaring the number of the Beattyville bonds to be due.

A. No, sir; I don't remember the exact number. To the best of my recollection it was somewhere between eleven and twelve hundred.

Q. Do you remember how many of these bonds so signed for were actually held unclaimed in the custody of the improvement Co. at that time:

A. No, sir; not the exact number, but I can state that it was less than 100.

Q. Nearly the entire amount then, signed for in the declaration, were bonds that were hypothecated, and in the hands of pledgees, were they?

A. Yes, sir; but to a large extent the parties who held the bonds as pledgees also signed the declaration.

Q. Please indicate who the parties were that were pledgees of these bonds as near as you remember them.

A. The Louisville Trust Co., Bennett H. Young, Louisville Banking Co., and the Columbia Finance and Trust Co., so far as I remember.

Q. You made sale did you not of quite an amount of the guaranteed bonds of the first installment, being part of the serial numbers from 1 to 600 inclusive?

A. The company made a sale. I did not personally conduct the negotiations for the company with all the parties.

108 Q. Was there not a kind of subscription paper gotten up and signed by parties agreeing to take so many bonds?

A. That was true of the bonds that were sold to parties away from here.

Q. New York parties and others, you mean?

A. Non-resident parties.

Q. How was it as to the Kentucky parties?

A. I don't remember that that was observed as to the Kentucky parties. My impression is that the bonds that were sold from the home office were dealt out in small amounts to a large number of parties, and very often delivered as they were called for. That is, without any prior negotiations.

Q. Your memory is then, that there was no subscription paper such as there was prepared and signed by New York and Chicago and other parties?

A. No, I did not mean to state that. I think that in all probability there were some papers signed by parties here.

Q. Where are those papers now?

A. If I am correct in that, they will be found with the papers of the company as filed away by the secretary and treasurer and book-keeper.

Q. And where are those papers now? With the Louisville Trust Co., as assignee?

A. No.

Q. In Cornwall's possession?

A. Those kind of papers are in the vault in my office, and have always been subject to the examination of the trust Co., or the book-keeper, or anybody that is interested in them.

Q. As a matter of fact, was not it the understanding when this New York subscription was gotten up, that there should be a similar subscription gotten up here by the interests at Louisville here, that should undertake to dispose \$200,000 of the bonds or thereabouts?

A. It was understood that one-half of the issue of \$600,000 should be sold among our people here.

Q. You remained in New York and helped to get up that \$300,000 subscription there?

A. Remained where?

Q. You remained in New York when that contract was made between the New Albany Company and the Ohio Valley Improvement and Contract Co.?

A. No, sir; I did not remain there. I came back to Louisville, and when the paper was sent to me with Mr. Hitt's signature to it as a subscriber, then I went to Chicago and got one or two signatures there.

109 Q. You got Mr. Pullman's?

A. Mr. Pullman's and Mr. Carson's and then I went to New York and remained there until all or a large portion of the remaining signatures were fixed.

Q. Then after that was done did you return to Louisville and undertake to get up a syndicate that would take the other \$300,000 of the guaranteed batch of bonds?

A. I don't remember the dates at which either of these \$300,000 of bonds were actually sold, but my impression is that the eastern syndicate was made up before we sold all the remaining \$300,000 of bonds here, but I am not sure of this.

Q. There are facilities, are there not, among your books and papers to ascertain whether there was or not one or more subscription papers gotten up here and signed at Louisville, and in the West?

A. Oh, I have no doubt but what our secretary and our book-keeper can answer definitely as to all these questions.

Q. Do you remember who here in Louisville and in the State, subscribed for and took some of these guaranteed bonds; if so give their names and residences so far as you remember?

A. The Ohio Valley Improvement and Contract Co. also sold a large number of bonds among other people here that were not endorsed, and it would be rather uncertain for me to attempt from memory to separate those who took indorsed bonds from those who took unindorsed bonds. I know some of the people who took endorsed bonds at that time, but I could not give the amounts that each one had.

Q. That will have to be gotten from the books?

A. That can be gotten from the books. I have no doubt the

books show correctly the name of every man, and the number of bonds that were sold, whether guaranteed or unguaranteed.

Q. State the names of the parties here according to your recollection who bought any of the guaranteed bonds.

A. Dennis Long took some. Theodore Harris, J. W. Stein, Vernon D. Price, William Cornwall, Junior; Cornwall and Brother. My four were out of that number. Mr. Deppen who is now dead. Mr. R. A. Newhouse who is now dead. W. H. Dillingham, Dr. Barnes, the dentist. I think Shuttleworth & Gorman's bonds were endorsed. The rest would be mere surmise; I cannot separate them.

110 Q. Do you remember about the pledge of the 125 bonds to the Louisville Trust Co., and then getting them out of pledge and sending them on to New York for the purpose of having the guarantee put upon those particular bonds?

A. I remember a circumstance of that kind, the circumstance about the \$125,000 of bonds that were first hypothecated with the Louisville Trust Co., and afterwards withdrawn, and the endorsement placed upon them and returned to the Louisville Trust Co. The facts are correctly set out in the answer of the Ohio Valley Improvement and Contract Co., filed in this case. My recollection is that these bonds were pledged for borrowed money prior to the endorsement, with the understanding that so soon as we were entitled to have more bonds endorsed under our contract with the Louisville, New Albany & Chicago Railway Co., that these bonds were to be included among the bonds to be endorsed, and were to be returned to the trust Co. They were never taken back from the pledge by the Ohio Valley Contract Co., but were simply forwarded to obtain the endorsement upon them according to the agreement made at the time they were pledged.

Q. Was this agreement that you speak of with regard to these unendorsed bonds being made endorsed bonds after the pledge was made, in writing or an oral understanding?

A. It was simply an oral understanding.

Q. Between whom?

A. Between the officers of the Louisville Trust Co., and the officers of the Ohio Valley Improvement and Contract Co.

Q. Which officers of both companies?

A. Mr. Loving, and I think Mr. Cochran of the trust Co., had knowledge of it. I had knowledge of it on the part of the Ohio Valley Improvement and Contract Co., and I think Mr. Cornwall, our secretary and treasurer also had.

Q. Was there any action on the part of the directors of the Ohio Valley Improvement and Contract Company, of any such kind as that?

A. No, sir; I don't think there was.

Q. Did you not personally bring with you from New York the \$585,000 of bonds which were endorsed on the 11th of March, 1890?

A. My recollection is that I did not.

Q. Did you not express them, or personally see that they were expressed?

111 A. I do not remember whether I did or not, but I either personally attended to it or directed some one else to do so.

My recollection is that they were sent by express, and if it was not attended to before I left New York I left definite directions for somebody to do it. I cannot recollect exactly how it was done.

Q. Of that amount \$292,000 were either sent directly to the Louisville Trust Co., or were placed there by your directions, were they not?

A. I cannot remember the numbers of those bonds. I met Mr. Helm last week, and requested him, if he expected to examine me about these kind of things, that he would give me a memorandum so that I could look them up and be able to answer definitely. He did not give me any memorandum, and consequently I would be answering at random as to the exact amounts.

Q. You however do remember do you not that there was fully up to half, or about half of the last batch of 585 bonds endorsed were placed here in the Louisville Trust Company, to be delivered over to the New York syndicate subscribers on payment?

A. I expect that is correct. By reference to our books I could give the exact amount.

Q. Refreshing yourself by examining a copy of the answer of the improvement company, filed in this case, you may state whether or not \$282,000 of the guaranteed bonds of the second batch were not deposited with the Louisville Trust Company, in trust for the New York syndicate of purchasers, to be delivered to them on payment?

A. They were so deposited for the syndicate of which the New York purchasers were a part.

Q. By whose orders were they deposited there?

A. By mine, as president of the Ohio Valley Improvement & Contract Company.

Q. By refreshing yourself again by that answer, please state how many of those 292 guaranteed bonds so lodged with the Louisville Trust Company, had been delivered to purchasers before the institution of this suit?

A. The allegation of the company's answer is that \$78,000 had been so delivered, and I have no doubt that is correct.

Q. That left \$214,000 of bonds then that were with the Louisville Trust Company, in trust for the syndicate of purchasers did it?

A. Yes, sir.

Q. Now what became of those bonds?

A. I am not able to answer without examining the books. It could only be answered by some one who was familiar with the books.

112 Q. Outside then of this \$291,000 so deposited in trust for the purchasing syndicate and others that left \$293,000 did it?

A. Yes, sir.

Q. And of that, \$125,000 were the hypothecated bonds of the Louisville Trust Company?

A. Yes, sir.

Q. Deducting those leaves \$168,000, does it not?

A. Yes, sir.

Q. That seems to be the exact amount of bonds that were surrendered for cancellation. Do you know what became of those \$214,000 of bonds that were lodged with the Louisville Trust Company, or any of them?

A. No, sir; I do not, but our secretary and book-keeper can undoubtedly give the information.

Q. Did you ever give any direction with regard to their custody or disposition other than to deposit them with the Louisville Trust Company in trust for delivery to the purchasing syndicate?

A. Well, I cannot answer that without an examination of the books and papers. I expect though that it will be found that a considerable number of them were delivered to the purchasers under the agreement by which they were deposited with the trust company.

Q. You are foreclosing, are you not, the mortgage to the Central Trust Company, securing these first-mortgage bonds both guaranteed and unguaranteed?

A. A suit for that purpose is pending in the United States circuit court for this district.

Q. You are counselor for the complainant?

A. Yes, sir.

Q. Do you represent all the bondholders as such, or any of them, or do you represent simply the trustee?

A. I represent simply the trustee.

Q. Have the bonds been proven up in the case?

A. No, sir.

Q. The Louisville Trust Company has itself intervened?

A. Yes, sir.

Q. Has anybody except it as a bondholder intervened?

A. No, sir.

Q. Do you know, or have you a list of all the bondholders?

A. No, sir.

Q. Have you a partial list?

A. Not as counsel in that suit. We have on the books of the Ohio Valley Improvement & Contract Company, a list of all the parties to whom the company sold bonds, but whether that is a correct list of the present holders or not I could not say.

113 Also the deposition of BENNETT H. YOUNG, who being duly sworn and examined by Mr. Crawford for the complainant, deposed as follows:

Q. State your name, residence and occupation?

A. Bennett H. Young, I reside in Louisville, Ky.

Q. Are you now, or have you ever been the owner of any bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, endorsed by the Louisville, New Albany & Chicago Railway Company, if so how many?

A. I never was the owner of but two of those bonds, one of which I still have in my possession.

Q. Will you kindly furnish the serial number of that bond in reference to this interrogatory?

A. I will send to the stenographer the number of this bond.

Q. I see by the original declaration signed by the stockholders on the Central Trust Co., trustee, that you signed as owner for ten and one-third bonds, and as collateral security for fifty-five bonds. Were all of those outside of the one or two guarantees or unguaranteed bonds?

A. None of those bonds were guaranteed bonds. All the bonds for which I signed were bonds that did not have the guarantee of the Louisville, New Albany and Chicago Railway Co.

Q. To whom did you sell the one guaranteed bond which you do not now hold?

A. That one bond I sold through a broker. It was sold through the trust company. I will find out and answer.

Q. Did you ever sign a subscription paper here to take these guaranteed bonds or any part of them?

A. No, sir.

Q. Do you know of any such paper?

A. No, sir; I heard there were some bonds sold, but I do not know personally.

Q. Were you a stockholder or interested in the Ohio Valley Contract and Improvement Co.?

A. I had some stock in the company.

LOUIS V. CASSILLY being duly sworn and examined by Mr. Crawford for the complainant, deposed as follows:

Q. Please state your name and residence?

A. Louis V. Cassilly, Louisville, Ky.

Q. Were you ever officially connected with the Ohio Valley Improvement and Contract Co.? If so, in what capacity, and from what date to what date were you so connected?

114 A. I was the book-keeper of the Ohio Valley Improvement and Contract Company from about the last part of 1888, November or December. That was about the time that I went with them, and I stayed with them until the time of assignment to the Louisville Trust Co.

Q. What date was that?

A. I don't remember. That was the last part of 1892.

Q. You were therefore the book-keeper of the improvement Co. from its origin to the time of its assignment?

A. Yes, sir; from the time that it commenced doing business.

Q. How many bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company did the improvement company receive on its contract for constructing the railroad?

A. They received \$2,375,000 of railroad bonds at par.

Q. Of that number how many ever bore the endorsement or guarantee of the Louisville, New Albany & Chicago Railway Co.?

A. Eleven hundred and eighty-five.

Q. Was the latter amount of bonds you have just mentioned all

guaranteed at one time, or if not at one time, at how many times? And give the dates as near as you remember.

A. I think the first number that were endorsed was six hundred. That was the last part of 1889. The next number was 585, and they were endorsed one or two months later as near as I can remember now.

Q. Of that first number of bonds of six hundred, what disposition was made of them?

A. There was three hundred sold to an Eastern syndicate and three hundred sold to Louisville parties.

Q. How were the sales to the Louisville parties effected and by whom?

A. Well, I don't remember just exactly how it was done. There were subscription papers circulated here by a number of parties who were interested in the company, and people took them, and they were turned over to them. I don't remember any more than that.

Q. The disposition of the bonds here at Louisville then was by way of signing subscription papers by the purchasers, according to your recollection?

A. According to my recollection.

Q. You saw those subscription papers when you were in the office, didn't you?

A. I presume I did at the time.

115 Q. They ought to be among the files and papers of the company?

A. I won't say there were any subscription papers signed. The parties agreed to take them, and I cannot remember whether the parties who took them just had them turned over to them, or whether they signed the paper. I cannot remember. If there were subscription papers they never were destroyed, and they will be found among the records somewhere.

Q. And then the subscriptions were entered on the books?

A. No, sir; the subscriptions were not entered on the books.

Q. I do not mean the books of subscription, but the name of the subscriber, and the amount and price, those were all entered?

A. When they bought the bonds we of course credited up the amount of their payment.

Q. Up until that time did the improvement Co. owe any indebtedness here to the Louisville Trust Co.?

A. I cannot remember in regard to that.

Q. None of the first numbers of bonds guaranteed, from No. 1 to No. 600, were used as collateral, were they? They were all sold outright?

A. Yes, sir.

Q. Three hundred East and three hundred West?

A. Yes, sir.

Q. Then of the second batch of 585 bonds, what was done with those bonds?

A. My recollection of it is that there was fifty-two of those bonds

sold to Eastern parties, that is, what we always called the Eastern syndicate. I don't remember what was done with the others.

Q. Where are the books and papers of the improvement Co.?

A. They are in the office of Richards, Weissinger & Baskin.

Q. In this building?

A. Yes, sir.

Q. If you have an opportunity to investigate those books and papers you can be more precise in giving the dates of these different bond sales, the amounts realized, and the persons to whom sold, can you not?

A. Yes, sir; I can make up a statement of those sales.

The further taking of depositions in this behalf was thereupon by me adjourned until tomorrow morning, February 21st, 1893, at ten o'clock a. m.

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FEBRUARY 21ST, 1893.

THEODORE HARRIS, being duly sworn and examined by Mr. Crawford, for the complainant, deposed as follows:

Q. Please state your name and residence.

A. Theodore Harris, Louisville, Ky.

Q. Are you officially connected with the Louisville Banking Co., and if so in what capacity, and for what length of time have you been so connected.

A. I am president of the Louisville Banking Co., and have been for nearly twenty-six years.

Q. Do you individually own any of the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Co., bearing thereon what purports to be a guarantee of the Louisville, New Albany & Chicago Railway Co.?

A. I do.

Q. How many of such bonds do you now own?

A. \$20,000. Twenty bonds, of \$1,000 each.

Q. Is that all you ever owned with such guarantee?

A. All that I ever owned.

Q. I will ask you to examine your papers, and kindly furnish the examiner with the serial numbers of those twenty guaranteed bonds.

A. Said bonds are numbered as follows: Nos. 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281 and 282.

Q. When did you become the owner of those bonds, and how?

A. I don't remember the time. It was long ago. I bought them, I suppose, from the Ohio Valley Improvement & Contract Co.

Q. Of which Judge Richards was president?

A. Yes, sir; I suppose that I bought them from him. I know that I bought them from Judge Richards, representing, as I supposed, that company.

Q. Did those bonds bear the guarantee of the New Albany road when you bought them?

A. That is my recollection. I have not seen them since. Whatever endorsement they have now they had then.

Q. Did you sign a subscription paper agreeing to take those bonds in advance of the guarantee?

A. No, sir, I did not. I did not buy them until after the guarantee was on them. I did not subscribe for them before that time, and when I bought them I paid the money for them.

Q. You bought them from the Ohio Valley Improvement & Contract Co.?

117 A. I am not sure of that. I think likely.

Q. Were you a member of the Ohio Valley Improvement & Contract Co.?

A. Yes, sir.

Q. You held stock in it?

A. I did, unfortunately.

Q. You were a director in it, were you not?

A. Yes, sir.

Q. You knew of the contract between the Ohio Valley Improvement and Contract Co. and the New Albany road, which is made an exhibit in this case, wherein the New Albany road bound itself to attach its guarantee on those bonds, didn't you?

A. In a general way, I did. I knew of it as a matter of hearsay. I don't think I ever saw the contract.

Q. You knew of the New Albany road agreeing to attach its guarantee on those bonds in consideration of a certain amount of the stock of the Nicholasville, Irvine and Beattyville Railroad Co., which stock was to belong under its construction contract to the Ohio Valley Improvement and Contract Co.?

A. I think that is the contract.

Q. That is the general nature of the contract?

A. I think it is.

Q. That as you remember it was in a written contract adopted by the board of directors of the improvement Co., of which you were a member?

A. I don't remember of being at any meeting of the board when any such contract was presented to the board, and I don't remember ever having seen the contract.

Q. You knew, in a general way, that that was the arrangement?

A. I knew in a general way, as a matter of hearsay told me by Judge Richards, that there was some contract with the Monon Railroad Company whereby, in consideration of stock given to the Monon railroad, they would guarantee the principal and interest of those bonds.

Q. How many bonds of the Beattyville Railroad Company, using that phrase for short, purporting to be endorsed by the New Albany road, are now owned or held by the Louisville Banking Co., of which you were and are president?

A. Speaking from memory, I think five or six. There may be as many as ten.

Q. Did the Louisville Banking Co. ever at any time have any larger amount of guaranteed bonds than the number it now holds?

A. I could not say positively about that.

118 Q. What is your best impression on that subject?

A. I rather think not.

Q. Does the Louisville Banking Co. now hold these bonds as owner or as collateral security?

A. It held them, first, as collateral security. It holds them now as owner.

Q. In what manner did it become owner?

A. By sale.

Q. Under the power of pledge?

A. Yes, sir.

Q. Given in the note which represented the original loan?

A. Yes, sir.

Q. Do you remember when the bank undertook to sell the collateral out and become the owner?

A. Speaking from memory I should think probably six months ago.

Q. Since this suit has been brought?

A. I don't know anything about the suit—not since service was had upon the Louisville Banking Co.

Q. Do you recollect about what time the original loan was made to the improvement & contract Co., and these guaranteed bonds taken in pledge?

A. There were two loans, made probably three years ago, perhaps not so long—made more than a year and a half ago, or as much as a year and a half ago.

Q. Could you by examining the bank books give the dates of those loans?

A. Yes, sir.

Q. I will ask you to furnish a statement to be annexed to your deposition that will give the date and amount of each of those loans, when due, and also the serial numbers of the Beattyville bonds guaranteed by the New Albany Company, that were held as collateral to each of such loans?

A. I will furnish such a statement.

The deposition of LOUIS V. CASSILLY was thereupon continued by Mr. Crawford as follows:

Q. Since your examination yesterday have you made an examination of the books of the improvement Co. to ascertain to whom the \$78,000 of bonds were delivered by the Louisville Trust Co.?

A. The books won't show to whom the seventy-eight bonds were delivered, but I can tell you, I have inquired.

Q. Whom have you inquired of?

119 A. I inquired of Judge Richards. The seventy-eight bonds were delivered to George M. Pullman, Robert R. Hitt and John B. Carson.

Q. Delivered here in Louisville?

A. That was done through the trust Co. I don't suppose they were.

Q. Is not there anything whatever on the books of the improvement & contract Co. to show that transaction amounting to \$78,000 of bonds?

A. There is a memorandum of credits for any money that was received.

Q. What book would that account be entered in?

A. It would be in the cash book in the first place, and then posted to the ledger.

Q. Those books are in this building, in President Richards' office?

A. Yes, sir.

Q. You examined them this morning?

A. Yes, sir.

Q. You got that information with regard to the delivery of these bonds to Pullman, Hitt and Carson, from Judge Richards?

A. Yes, sir.

Q. You did not investigate the books on that subject?

A. No, sir.

Q. Now I ask you to refresh your recollection by an affidavit on file of Dr. Breyfogle, and state whether you remember anything about the deposit of 292 bonds, \$292,000, with the Louisville Trust Co. in March, 1890?

A. Down there this morning I saw some papers on this subject, that they had been deposited—Louisville Trust Co.'s receipts.

Q. You saw their receipts?

A. Yes, sir.

Q. That is among the files of the improvement Co.?

A. Yes, sir.

Q. Have you investigated since your examination yesterday for the purpose of ascertaining when the bonds now claimed to be held in pledge by the Louisville Trust Co. were handed over to them by the improvement Co.?

A. All the bonds that the trust Co. has were given to them by the contract Co.

Q. Have you investigated to find the different dates at which they obtained their custody.

A. The trust Co. people are going to look that up.

Q. Have you done so?

A. No; I didn't suppose there was any use of our both investigating the same thing.

120 Q. Don't you know, as a matter of recollection, that prior to the bringing of this suit that the trust Co. only had in pledge \$125,000 of the guaranteed bonds?

A. I do not.

Q. Don't you know as a matter of fact that when they received the \$292,000 of bonds that were embraced in the notice sent out to the syndicate purchasers, that they only had \$125,000 of the guaranteed bonds in pledge?

A. They are going to look up all those points, and so I did not look that up.

Q. Haven't you any recollection of your own, refreshed by the books and examination?

A. No, sir.

Q. Don't you know as a matter of fact that the Louisville Trust Co. have, since this suit was brought, and since the circular was issued by the Louisville Trust Co., March 21st, 1890, stating that they had 292 bonds, that they have taken some of those, and claim to hold them in pledge for the debt due by the improvement Co. to the trust Co.?

A. Yes, sir; I think they have got some of those same bonds down there as collateral.

Q. They have got 211, haven't they?

A. They had a total of 336 bonds, 125 and 211.

Q. And is not the latter 211 a part of the same \$292,000 of bonds referred to in the circular of the Louisville Trust Co., dated March 21st, 1890?

A. Yes, sir; I think they are.

Q. When did they get them?

A. They got them at different dates, from time to time.

Q. What dates?

A. I don't know. They will furnish a statement showing that.

Q. Didn't you look this morning so that you could state generally? Was not it in 1890?

A. I cannot say that it was.

Q. Can you say that it was not?

A. I don't think it was.

Q. Was it some time in 1891?

A. I don't know whether they got any in 1891 or not, I never looked that point up. I cannot say whether they got them all in 1890 or not. I would not be surprised if they got some in 1891.

Q. The fact that they are pledged is entered upon the books of the contract and improvement Co., is it not?

A. Yes, sir; a memorandum that they are pledged.

Q. Did you see a copy of the original printed circular of the Louisville Trust Co. among the papers of the improvement Co. when you were examining them?

121 A. I think that paper that you have is a copy of the paper that I saw there.

Q. Did the improvement Co. deposit with the Louisville Trust Co. at any time in March, 1890, any bonds in trust to be distributed to the syndicate of purchasers?

A. Yes, sir.

Q. If the Louisville Trust Co., on that transaction executed any receipt, or circular, and delivered the same, evidencing the deposit of that number of bonds with them, please produce the original for the purpose of having a true copy made as a part of your deposition?

A. I have one of the letters of the trust Co. issued at that time in regard to these 292 bonds, which were deposited with them. It is in words and figures as follows, to wit:

"OFFICE OF THE LOUISVILLE TRUST COMPANY,
LOUISVILLE, KY., *March 21st, 1890.*

DEAR SIR: The Ohio Valley Improvement and Contract Company has deposited with us, the Louisville Trust Company, two hundred and ninety-two of the first-mortgage bonds of the R., N. I. & B. R. Co., of the denomination of \$1,000 each, principal and interest guaranteed by the endorsement of the Louisville, New Albany and Chicago Railway Co., which are held in trust by us, to be delivered to the syndicate of purchasers, of which you are a member. This is a fraction over one-fourth of the total, your proportionate share amounting as near as may be to three bonds of \$1,000 each, which will be delivered to you upon your order, and the payment of the purchase price of ninety cents on the dollar, and accrued interest, at the rate of six per cent. from January 1st, 1890, the date from which the attached coupons begin to run. The checks should be sent payable to the order of the Louisville Trust Co. If you prefer it we will draw on you with the bonds attached, at sight, on the 5th day of April next.

Respectfully yours,

LOUISVILLE TRUST CO."

Q. I understand that the deposit of these bonds appears on the books of the trust company?

A. I don't know about that.

Q. Was there any different arrangement so far as you know, about those 292 bonds, other than that evidenced by that receipt of the trust Co.?

A. At that time?

Q. Yes.

A. That is the only arrangement that I know about.

Q. Has there been any arrangement since that time different from this?

A. The bonds are not still in trust.

122 Q. When did they go out of the trust? When was that trust cancelled?

A. I don't know anything about that.

Q. Do you know that the trust was ever cancelled?

A. I don't know anything about that.

Q. When did you first know that the bonds, or some of the bonds embraced in this trust, and a part of the 292 bonds, were claimed by the Louisville Trust Co., to be held as collateral?

A. I don't know the dates.

Q. About when?

A. I don't know about when.

Q. How long was it after this?

A. It may have been any time within a year after this.

Q. Was it within a year do you think?

A. I presume it was.

Q. Was it within six months?

A. I cannot say.

Q. Was it within four months?

A. I cannot say.

Q. Is it not your impression that it was not?

A. It was within a year, and that is as near as I can come to it.

Q. What was the arrangement then that you think was within a year, in regard to these bonds?

A. The bonds were afterwards pledged to them on loans.

Q. You have among the books and papers of the improvement Co. the dates at which the pledges were made?

A. Yes, sir, when those pledges were made.

Q. I will ask you to produce them so that we can ascertain when those bonds became hypothecated.

A. The trust Co. is going to furnish a statement of that.

Q. I have a right to examine the improvement Co. as to that matter also. You examined the books this morning of the improvement Co., did you?

A. Yes, sir.

Q. And there are entries on those books with regard to this very transaction about which I inquire, showing the pledge of some of these bonds embraced in that trust receipt, with the dates, by the improvement Co.?

A. There are entries in regard to all pledges of bonds. The books are not in my custody. They are in the custody of the Louisville Trust Co. as assignee.

Q. They are also in the office of Judge Richards to which place we have adjourned for the purpose of taking this deposition?

123 A. Yes, sir.

Q. You examined them this morning?

A. Yes, sir.

Q. What books would these entries be on?

A. They are likely to be on any.

Q. What one?

A. It would be on the bills-payable for one.

Q. You saw the bills-payable book this morning?

A. Yes, sir.

Q. It is in the office of Judge Richards, where you are now?

A. Yes, sir. You can get all that information from the trust Co.'s books. They also kept books on it. The Louisville Trust Co. is making up the statement with regard to that, and they will furnish all that information. They have also looked at the books of the improvement Co. to ascertain the facts in regard to the matter.

Q. Have you got a list of the names of persons to whom the bonds were sold outside of the New York syndicate of \$300,000?

A. Yes, sir; I will furnish that list.

By Judge RICHARDS: There is no objection to the witness examining the books for the purpose of giving a statement of matters asked for, provided some time is fixed for it when he can have the time to do it.

By Mr. CRAWFORD:

Q. Now I ask you to step into the next room, and get the bills-payable book, and turn to the first entry at which the first pledge is

made of any part of this \$292,000 of bonds, and read off that entry, the date and amount of it?

A. I have not got the books in my possession.

WM. G. WETTERER, being duly sworn and examined by Mr. Crawford for the complainant, deposed as follows:

Q. Please state your name, residence and occupation?

A. Wm. G. Wetterer, assistant secretary and treasurer of the Louisville Trust Co.; residence Louisville, Ky.

Q. Were you officially connected with the Louisville Trust Co. in the years 1888 and 1890, and continuously until the present time?

A. In the years 1889 and 1890 I was book-keeper in the trust department of the Louisville Trust Co.

Q. And since then you have been connected with it?

A. Since March, 1892, I have been assistant secretary and treasurer.

Q. As such are you familiar with the books, papers and accounts of that company?

124 A. Yes, sir.

Q. Is the Louisville Trust Co. a creditor of the Ohio Valley Improvement & Contract Co.?

A. It is.

Q. Please refer to the books of the trust Co. and state when the trust Co. made its first loan to the improvement Co. the amount loaned, and what securities were hypothecated on that loan?

A. The first loan was made September 13th, 1889. It was on a note dated September 13th, 1889, at four months, with 216 first-mortgage bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Co., as collateral. The amount of the note was \$100,000.

Q. Have you got the numbers?

A. No. 1 to No. 216 inclusive.

Q. Was it a note of the Ohio Valley Improvement & Contract Co.?

A. Yes, sir.

Q. Any personal endorsers or guarantors on it?

A. No, sir.

Q. That is the only security?

A. No, sir. There was certificate No. 7 for 2,160 shares of the stock of said Beattyville Railroad Co.

Q. Did the Louisville Trust Co. retain these 216 bonds until the full maturity of that note, or what disposition was made of them?

A. No, sir. We retained them from the 13th of September, 1889, to the 20th of November, 1889, when they were withdrawn by the Ohio Valley Improvement & Contract Co., to be exchanged for endorsed bonds, and in their stead Nos. 647 to 771, both inclusive, were substituted as collateral on said note, dated September 13th, 1889.

Q. Please explain a little more fully what you mean by endorsed bonds?

A. Bonds endorsed or guaranteed by the Louisville, New Albany & Chicago Railway Co. They were withdrawn to have that endorsement placed on them.

Q. Are you testifying about this matter simply from your mere personal recollection, or have you some original documents or papers that evidence the transaction; if so kindly produce the same so that a copy may be attached?

A. I am testifying from the receipt given by the Ohio Valley Improvement & Contract Co., dated November 20th, 1889, a copy of which is in words and figures as follows, to wit: "Received of the Louisville Safety Vault & Trust Company 216, first-mortgage bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad 125 Co., numbered from No. 1 to No. 216 inclusive, \$1,000 each, with all the coupons attached thereto, the said bonds having this day been delivered to us for the purpose of enabling us to forward same per express to New York in order that they may have placed thereon the engraved guarantee of the Louisville, New Albany & Chicago Railway Co., as per contract and agreement of said company, said bonds having been pledged to said trust Co. as collateral security on a note for \$100,000, dated September 13th, 1889, at four months. Witness our hand this November 20th, 1889, Ohio Valley Improvement & Contract Co., by Wm. Cornwall, Jr., secretary and treasurer."

I will state by way of explanation that the then corporate name of the Louisville Trust Co. was "The Louisville Safety Vault and Trust Co."

Q. Kindly state whether there is any written agreement that you should get back not the 216 bonds, but only 125, and if so who made that arrangement or agreement?

A. I don't know.

Q. That note of September 13th, was not paid at maturity?

A. No, sir; it was renewed on January 30th, 1890.

Q. As of the date of January 16th, 1890?

A. Yes, sir.

Q. Did your company retain bonds numbered from No. 647 to 771, after November 21st, and down until the date of the renewal on January 16th, 1890?

A. Yes, sir.

Q. Have you got a copy of the note, or have you got the original note of January 16th, or has that been renewed?

A. That note has been renewed, but I have a copy of it here.

Q. Will you kindly read the copy of the note as part of your answer?

A.—

"LOUISVILLE, KY., January 16th, 1890.

Six months after date we promise to pay to the order of the Louisville Trust Company, one hundred thousand dollars value received, negotiable and payable at the office of said company, with interest thereon from maturity until paid, at the rate of seven per cent. per annum, payable semi-annually, viz: on the — day of —,

and — of each year during the existence of this loan. And we pledge, first, as security therefor, and second as security for any other debt we may owe said company, the following collaterals, to wit, one hundred and twenty-five first-mortgage bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, numbers 647 to 771 inclusive. And agree that said collaterals may be sold at our expense, by public outcry, at any place in the city of Louisville, on ten days' notice, in writing, to the undersigned, for purpose of paying said indebtedness, provided it is not paid when due or demanded.

OHIO VALLEY IMPROVEMENT AND CONTRACT COMPANY,

By A. E. RICHARDS, *President.*"

That has the following endorsement on it:

"The bonds mentioned within were withdrawn by the Ohio Valley Improvement and Contract Company, and in lieu thereof the said company has deposited as collateral on this note one hundred and twenty-five (125) bonds, first mortgage, of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, Nos. 1051 to 1175 inclusive, \$1,000 each, principal and interest guaranteed by the Louisville, New Albany & Chicago Railroad Company. This March 17th, 1890, Ohio Valley Improvement and Contract Company, by Wm. Cornwall, Jr, treasurer."

Q. Is that the only document with reference to the transaction of which you know anything officially?

A. I have the original note cancelled, here before me.

Q. That is the original of which you have read a copy?

A. Yes, sir.

Q. Did you have any personal knowledge of this matter at the time that it occurred, or is your knowledge with regard to it simply derived from your recent examination of the papers and files of the trust company?

A. My knowledge is simply derived from a recent examination of the papers.

Q. You know nothing beyond the face of the papers?

A. No, sir.

Q. Was that note of January 16th, paid or renewed?

A. It was renewed or the 29th of July, 1890, by a new note dated July 19th, 1890, and due in four months from the date thereof.

Q. For how much?

A. For \$100,000, with the following collateral, two hundred first-mortgage bonds of the Nicholasville, Irvine & Beattyville Railroad Company, for \$1,000 each, Nos. 1051 to 1175, both inclusive, and Nos. 1620 to 1694, both inclusive.

Q. Was there any endorsement on that of any change in the collateral or did that remain?

A. That remained as it was.

Q. Was that last note paid at maturity in November, 1890, or renewed?

127 A. That note was renewed on the 5th of December, 1890, as of November, 22nd, 1890, at four months, with the same collateral as on the previous note.

Q. That carries us to March, 1891. Was the note dated November 22nd, 1890, paid or renewed?

A. On March 23rd, 1891, the Ohio Valley Improvement and Contract Company, executed a note, dated March 17th, 1891, due July 1st, 1891 fixed, for \$125,000, which included the one hundred thousand dollar note, dated November 22nd, 1890, with four hundred first-mortgage bonds of the R. N. I. & B. R. R. Co., of \$1,000 each, Nos. 1051 to 1175, both inclusive; Nos. 1620 to 1694, both inclusive; Nos. 1401 to 1450, both inclusive; Nos. 1186 to 1198, both inclusive; Nos. 1751 to 1787, both inclusive; Nos. 2301 to 2375, both inclusive; Nos. 2176 to 2200, both inclusive.

Q. What was the extra \$25,000 for? Was that a fresh loan?

A. Yes, sir.

Q. State whether or not there was any change in this collateral during the maturity of the last paper you have mentioned; and if so what change?

A. There was a change. The note was endorsed in this way: "We have received of the Louisville Trust Company bonds No. 1638 to 1694 inclusive, and in lieu thereof, we have returned to said trust company, viz: Nos. 891 to 900 inclusive; 1001 to 1005 inclusive; Nos. 1008 to 1020 inclusive, and Nos. 1022 to 1050 inclusive, to correct a mistake heretofore made by said trust company, in surrendering endorsed bonds in an exchange made for our accommodation. Ohio Valley Improvement and Contract Company, by A. E. Richards, president."

Q. Have you got the original of that note with the endorsement?

A. Yes, sir.

Q. When was this endorsement put there?

A. I cannot tell you; there is no date.

Q. When was it put there?

A. I don't know.

Q. Did you see it when it was put there?

A. No, sir.

Q. What is the date that the transaction bears on the books?

A. I cannot tell you. As near as I can come to it from the investigation I have made it was July, 1891.

Q. What investigation have you made with regard to it to fix the date?

A. I have looked at the books of the Ohio Valley Improvement & Contract Company. Then there is another exchange made that we had no record of either.

128 Q. Was that paper dated March 17th, 1891, and due July 21st, 1891, paid?

A. No, sir.

Q. Please state whether or not the books and records of the trust Co. do not show that besides these 57 guaranteed bonds that were delivered over according to the memorandum that you have just read, there were not also 100 additional guaranteed bonds that

came into the custody of the trust Co. while that note was running.

A. There were 100 guaranteed bonds Nos. 901 to 1000, pledged as collateral on this debt, dated March 17th, 1891, for \$125,000, in lieu of numbers 2301 to 2375, both inclusive, and Nos. 2176 to 2200, both inclusive, of the unendorsed bonds.

Q. You get that from your official register?

A. No, sir.

Q. Where did you get it from?

A. I got it from the securities themselves.

Q. The securities themselves that you have here now would not show the date when you got them?

A. No, sir; and I have not given the date. I cannot give the date.

Q. You gave the date as being while this note was running?

A. This note is still running.

Q. I meant during its maturity?

A. Do you know the time at which the exchange of this \$100,000 of bonds numbered from 901 to 1000, being guaranteed bonds, were pledged in lieu of the unguaranteed bonds?

A. I only know from the books of the Ohio Valley Improvement & Contract Co., which shows that these numbers of bonds were delivered to us on the 8th of July, 1891.

Q. There is nothing in the books of the trust Co. which shows it?

A. No, sir.

Q. That last note, if I understand, is still outstanding and unpaid, and has not been renewed. Is that correct?

A. That is correct.

Q. At what time was it due?

A. July 1st, 1891, fixed.

Q. Is there any date showing the exchange of the 57 bonds?

A. No, sir.

Q. You cannot fix the date of the exchange of the 57 bonds?

A. Except in the same way that I fix the date of the 100.

129 Q. That is by the books elsewhere?

A. Yes, sir.

Q. Is the Louisville Trust Co. the creditor of the Ohio Valley Improvement & Contract Co. on any other account than the note of \$125,000 which you have testified is still unpaid and past due?

A. Yes, sir; there is one note dated March 10th, 1891, due in 60 days, for \$50,000 on which the following collateral is pledged: 133 first-mortgage bonds of the R. N. I. & B. R. R. Co., for \$1,000 each, and 30 bonds \$1,000 each, of the Ohio Valley Improvement & Contract Co., secured by a mortgage on real estate. The R. N. I. & B. bonds are numbered as follows: No. 2201 to 2250, both inclusive; No. 2251 to 2292, both inclusive, No. 798 to 838, both inclusive. The real-estate bonds are numbered from 1 to 30, both inclusive. That is the collateral that was given to that note when made.

Q. Was that renewed?

A. No, sir.

Q. Has there been any additional collateral?

A. No, sir. There is also another note dated July 29th, 1891, payable October 1st, 1891, fixed, for \$3,743.05, with thirteen first-mortgage bonds of the R. N. I. & B. R. R. Co., No. 768 to 780, both inclusive, pledged as collateral.

Q. On any of this paper was there any personal or collateral guarantees or securities?

A. No, sir.

Q. No endorsements of any individuals?

A. No, sir.

Q. Have you found among your papers a copy of the circular that was issued by this company on the 21st of March, 1890, with regard to the deposit of \$292,000 of bonds?

A. No, sir; I have not found any among our papers. I have found a copy of that kind with the papers of the Ohio Valley Improvement and Contract Co.

Q. Do you remember the issuing of that circular?

A. No, sir; I do not.

Q. What do your books show with regard to the delivery of seventy-eight of these bonds that were referred to in that circular?
A. I do not find anything in the books regarding that at all.

Q. Are there no books showing that seventy-eight of these bonds were delivered to John B. Carson, George M. Pullman, and R. R. Hitt, or their order?

A. No, sir.

Q. Is not there any showing on your books that verifies
130 that receipt which the Ohio Valley Improvement and Contract Co. holds, showing that there were \$292,000 of guaranteed bonds deposited with your trust company here, on March 21st, 1890, for distribution to syndicate purchasers?

A. No, sir; there is nothing on the books to show.

Q. Did you look among the correspondence to see whether there was any correspondence about it?

A. I looked everywhere, and I cannot find any record of it anywhere.

Q. Have you looked among the correspondence to see whether these circulars were not sent out?

A. I looked at all the papers that I thought had any bearing on the case at all.

Q. Are your books of correspondence in the vault?

A. Yes, sir.

Q. Under the custody of the time lock?

A. No, sir; they are in the book vault.

Q. The Louisville Trust Co. is the assignee of Wm. Cornwall, Jr., and Cornwall & Bro.?

A. Yes, sir.

Q. Under such assignments the Louisville Trust Co. holds, does it not, for each of those trust estates, certain of the guaranteed bonds of the Beattyville Company?

A. They hold bonds. I don't know whether they are guaranteed or not.

Q. Will you kindly file in response to this interrogatory a statement of the serial numbers of the bonds held for account of Wm. Cornwall & Bro., and particularly the serial numbers of guaranteed bonds held for the account of Cornwall & Bro. ?

A. I will.

VERNON D. PRICE, being duly sworn and examined by Mr. Crawford, for complainant, deposed as follows :

Q. Please state your name and residence ?

A. Vernon D. Price, Louisville, Ky.

Q. Were you ever connected with the Ohio Valley Improvement & Contract Co., as stockholder or officer ?

A. I am a stockholder. I never was an officer ?

Q. You were a stockholder from the origin, were you ?

A. Yes, sir.

Q. You knew the contract made by Judge Richards representing the improvement Co. with the New Albany Co., with regard to the guarantee by the latter company, of the bonds of the Richmond, Nicholasville, Irvine and Beattyville Co., did you ?

A. I did.

131 Q. You subsequently bought some of those bonds guaranteed, didn't you ?

A. I have found in the last few weeks in looking over my bonds that I had some.

Q. How many ?

A. Four.

Q. What are their numbers ?

A. No. 294, No. 293, No. 1007 and No. 1021.

Q. Are those all that you ever did hold ?

A. No, I had five, I think five, but I sold some of my bonds probably a year ago, and took them out at random. I did not notice at the time, or until this question came up, that I had disposed of any of those that were guaranteed.

Q. How many did you dispose of ?

A. One.

Q. To whom ?

A. I don't know. I sold through a broker.

Q. As I understand, you never owned but five ?

A. No, sir.

Q. And of the five you still own four ?

A. Yes, sir.

Q. One guaranteed bond you parted with about a year ago inadvertently ?

A. Well, it probably may have been over a year.

Q. Do you hold any as collateral ?

A. No.

Q. You hold all told, of guaranteed and unguaranteed, about sixteen ?

A. Either twelve or sixteen.

Q. You do not hold any guaranteed bonds as collateral security or as trustee of any other owner?

A. No, sir.

Q. Did you make sale of some of these guaranteed bonds about the time of their issue?

A. At the time the company had them for sale I sold some around.

Q. Who employed you to make sale of them? Did you have a contract for making the sale of them, or a commission?

A. No, I was just interested in the company, and I knew a great many people around through the town, and saw them and got them to take them.

Q. In what official capacity were you with the Ohio Valley Improvement Company?

A. Not in any official capacity.

Q. You were interested in the enterprise, and around the office?

132 A. Only as a stockholder.

Q. You were interested as a stockholder?

A. Yes, sir.

Q. Did you sell these bonds under an employment by Judge Richards for a commission, or give your services in the matter gratuitously?

A. In making the sale I went around, as I did to a great many of those who had those securities, to people that I knew, and got them to take some. A great many went up and took bonds after I told them about it—went up to the office.

Q. I am asking you whether you were employed for a commission on the sales that you made, or received a commission?

A. I believe in one instance I got a small commission.

Q. Who did you make sales of the bonds to?

A. Well, I don't remember now. There was several. I remember Newhouse & Co.

Q. How many did they buy about?

A. I think he took \$10,000.

Q. Did he pay for them to you in cash?

A. No, he did not pay me at all.

Q. You simply got him to agree to take the bonds?

A. Yes, sir, just went down and got his name.

Q. You got his name?

A. That is all.

Q. On a paper agreeing to take the bonds?

A. Yes, sir.

Q. The people that you saw sign that kind of a subscription paper? You were trying to make up a syndicate in Louisville and around, to place a large number of bonds?

A. That is it.

Q. All the persons you saw sign these purchase contracts agreeing to take the bonds?

A. No, by no means.

Q. I don't mean all you saw, but all you finally concluded arrangements with signed subscription papers?

A. I think there was half a dozen or so took some bonds of me.

Q. Those people that you mention that agreed to take bonds, how was their agreement evidenced? Was it by written signature to a paper which you asked them to sign, agreeing to take the bonds?

A. That is the way that it was.

Q. And the paper you delivered back to the improvement Co. with the signatures to it?

A. Yes, sir.

133 Q. Do you recollect anybody else except Newhouse?

A. Well, I think Mr. Ledman took some. I went out at different times off and on during a year or two for the Louisville Southern and the K. & I. Bridge Co., and I don't remember about this special transaction.

Q. Can you remember anybody's names except the one or two you have given?

A. Well, I think Dr. Barnes took ten, but afterwards backed out. I remember now that he did.

Q. He took ten and backed out?

A. Yes, sir; they let him off, I believe.

Q. Did Dillingham agree to buy through you, or through somebody else?

A. I did not see Dillingham.

Q. Who prepared these papers for you that you got these folks to sign?

A. I don't remember.

A. E. RICHARDS, recalled by his own request, testified as follows:

I was asked on yesterday for a detailed statement of what had been done with the \$585,000 of bonds that were guaranteed on March 11th. I answered that the statement made in the answer of the Ohio Valley Improvement & Contract Co. in this case was correct—that is, that \$292,000 of them had been immediately after they were guaranteed, deposited with the Louisville Trust Co., in trust for the syndicate of purchasers, to be delivered to them as paid for; that of those \$78,000 had been delivered to the purchasers before the institution of this suit, and of the remaining \$293,000 of such bonds, \$125,000 had been hypothecated with the Louisville Trust Co. prior to their endorsement, and had been returned to them endorsed, and that the remaining 168 of the bonds had been since cancelled—the endorsement on them had been cancelled by the request of the Ohio Valley Improvement & Contract Co. I was then asked what went with the remaining 214 bonds deposited with the Louisville Trust Co.; as aforesaid, that being the number left after the \$78,000 of bonds had been delivered to the purchasers. I was unable to answer then. Since then I have sent for our old book-keeper who is not now in our employment, Mr. L. V. Cassily, and with his assistance I have gone over the books, and I am able

now to give an itemized statement of the disposition of those bonds, and desire to do so.

Of the last \$585,000 of bonds endorsed, \$125,000 were
134 delivered to the Louisville Trust Co. under the pledge above referred to. \$211,000 more of them have since that time been deposited with the Louisville Trust Co., as additional collateral for loans made prior and since the institution of this suit. Those bonds were deposited with the trust Co. as aforesaid, after advice with our counsel, Col. Thos. W. Bullitt, under an agreement with the trust Co. that they were to be held subject to the orders of the court in this case so far as said endorsement was concerned, and the president of the Louisville Trust Co. told me yesterday that his company was so holding them. When this action was instituted the individuals who were known as the syndicate of purchasers declined to take any more of the bonds under their agreement to purchase, and the pledging of them to the Louisville Trust Co. was after the purchasers had so declined to take them. Of the bonds with the guarantee which was cancelled by order of court \$167,000 of them were delivered to the Richmond & Irvine Construction Co., with the guarantee cancelled. The seventy-eight mentioned as sold in the answer of the Ohio Valley Improvement & Contract Co. prior to the institution of this suit, of those twenty-six went to R. R. Hitt, of Illinois, twenty-six to George M. Pullman, of Chicago, and twenty-six to John B. Carson, of Chicago. These seventy-eight having been a part of the two hundred and ninety-two bonds that had been deposited with the Louisville Trust Co. in trust for the purchasers, they were delivered by the trust Co. and the payments made through the trust Co. Our books do not show what time the trust Co. received the money, but we received from the trust Co. the proceeds of the payment of one of the parties on April 4th, 1890, and from another on April 10th, 1890. Those two payments were from Messrs. Hitt and Pullman. Mr. Carson gave a note for his, and that note not being paid at maturity, we finally agreed to take back from Carson the twenty-six bonds for which he had given the note. We so cancelled his note in September, 1890.

The books show that on October 3rd, 1891, two of these bonds were charged to me. I have no recollection of the transaction, but if it is correct, they must be among the thirteen bonds that I now have, and which are pledged either at the Columbia Finance & Trust Co., or the Farmers' Bank of Kentucky, at Frankfort. I have been to the trust company this afternoon to examine those, but found their vault closed, and will write to the Farmers' bank tonight so that I will be able to ascertain whether I have those two bonds or not. If I have they shall be forthcoming to answer any order that the court may make in regard to them.

135 On October 5th, 1891, five of these bonds were deposited with Col. Thos. W. Bullitt, one of the attorneys in this case, as collateral security to indemnify some parties who had gone on an injunction bond for the Ohio Valley Improvement & Contract Co., and he gave this receipt for the bonds, which I have now before me and will read.

"LOUISVILLE, KY., October 5th, 1891.

Received of the Ohio Valley Improvement & Contract Co. the five bonds above mentioned, Nos. 1181, 1182, 1183, 1184 and 1185, as a pledge on the conditions set forth in the above writing. The said bonds are to be subject to the orders of the United States circuit court so far as the guarantee of the L., N. A. & C. railway is concerned.

(Signed)

THOS. W. BULLITT."

The conditions referred to in that receipt are as follows:

"The Ohio Valley Improvement & Contract Co. desire to file a suit enjoining James McFadden and Cassidy from this day selling at public auction at the board of trade, \$26,000 of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company's mortgage bonds which this company has pledged to them as collateral security. Now this writing witnesseth, that in consideration of Thos. W. Bullitt and others signing the necessary bond to procure said injunction, the Ohio Valley Improvement and Contract Co. hereby deposits with said Bullitt \$5,000 in R., N., I. & B. R. Co.'s first-mortgage bonds as a pledge to indemnify said sureties against any loss they may sustain by reason of the signing of said bonds."

On November 18th, 1891, the remaining twenty-three bonds were deposited with the Columbia Finance and Trust Co. under the following agreement:

"This agreement between the Ohio Valley Improvement and Contract Co. of the first part, and Dennis Long, E. T. Halsey, Vernon D. Price, Bennett H. Young, J. W. Stine, Wm. Cornwall, Jr., A. E. Richards, H. V. Loving, Thos. W. Bullitt, A. L. Schmidt, J. S. Bronaugh, Jno. H. Welch and E. R. Sparks of the second part, witnesseth: That whereas the second parties at the request of the first parties signed a covenant executed by the Richmond, Nicholasville, Irvine and Beattyville Railroad Co. to the county of Jessamine in compliance with the third clause of its subscription to the capital stock of said railroad company, and said first party by written agreement, dated the 14th day of October, 1890, bound itself and assigns to indemnify each and every one of said sureties against loss by reason of their obligation upon said covenant; now in consideration of \$23,000 par value of the first-mortgage bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Company, this day delivered by the party of the first part to the parties of the second part, to be deposited with the Columbia Finance and Trust Co. upon the same conditions as the forty-five are now deposited, the party of the second part hereby releases said first party from its contract to indemnify them as sureties as aforesaid, but not to affect any of the county's remedies against the railroad. In testimony whereof the parties hereunto have signed their names, this 18th day of November, 1891." Then followed the signatures of all the parties above named.

On the margin of the paper, and as part of the agreement in the handwriting of Col. Thos. W. Bullitt, the attorney in this case, are the following words:

"Received of the Ohio Valley Improvement and Contract Co. the twenty-three bonds of the R., N., I. & B. Railroad Co., mentioned in the within agreement, to be held on the terms, and for the purposes therein stated, but with the understanding and condition that the guarantee of the Louisville, New Albany and Chicago Railway Co. thereon is to be cancelled under orders of the United States court in suit of L., N., A. & C. R'y Co. against the Ohio Valley I. & C. Co."

This transaction was attended to for the Ohio Valley Improvement and Contract Co. by Col. Bullitt, and this paper which I have just read from I received from his office, my recollection is, some time during the spring of 1892. I do not know what his intention was by the endorsement on the margin of the paper that I have read, but suppose it was the intention to make it a part of the receipt of the parties who signed the paper.

Objected to by counsel for complainant.

By the WITNESS: After the railroad Co. went into the hands of a receiver, and the obligation which it had given to Jessamine county for which these parties had bound themselves as sureties matured, Jessamine county demanded a performance of that obligation, which was to the effect that the railroad company would buy back from Jessamine county \$75,000 of the railroad company's capital stock at thirty cents on the dollar and these individual sureties were forced to pay the money to Jessamine county, that is the sum of \$22,500, and take the bonds that had been pledged as collateral security. Mr. Wm. Cornwall having become insolvent in the meantime, the remaining twelve sureties paid the money and took the bonds. I got one of the guarantee bonds in the distribution, and have been endeavoring during the day to find where it is, and have not yet done so. I will do so, and report it to the examiner.

When I testified yesterday, I did not recollect the fact that I had ever handled any of these endorsed bonds except the four that I had originally bought. Each of the other eleven above-named parties got one or more of those bonds, and held them under the agreement endorsed on the margin of the contract. Col. Bullitt is out of the city today, and I have not been able to get the benefit of his recollection in regard to this transaction, but will do so before I close my deposition. It was under his advice as our counsel in this case that the Ohio Valley Improvement and Contract Co. made these several agreements, depositing the bonds, with the understanding that they were to be held subject to the orders of the court in this case, so far as said endorsements were concerned, it being the intention of the officers of the company to at all times have the bonds that might be embraced in the orders of the court forthcoming to answer any judgment that might be rendered concerning the same. As to the twenty-six bonds that the company agreed afterwards to take back from Mr. Carson, they were among those that had been sold before this suit commenced, but I have included them in the statement with those that still remain on hand.

The bond account, therefore, as to the 585 bonds, stands thus: Louisville Trust Co. 336, Richmond and Irvine Construction Co. 167 cancelled, R. R. Hitt 26, George M. Pullman 26, A. E. Richards 2, Thos. W. Bullitt trustee 5, Columbia Finance and Trust Co. syndicate 23, total 585.

One of the bonds held either by Richards or Bullitt trustee must have been among those cancelled by the orders of court, as there were 168 cancelled, and only 167 of them delivered to the Richmond and Irvine Construction Co. As a matter of fact there were only 168 of those bonds in the actual custody of the Ohio Valley Improvement and Contract Co. at the institution of this suit, but as the others came into the custody of the company as above stated after the proceedings had been pending, for the sake of being careful to observe the orders of the court we adopted the rule under the advice of Col. Bullitt, to require the parties who received them to enter into the agreement above stated to hold them subject to the orders of the court.

138 The deposition of THEODORE HARRIS on further cross-examination by counsel for plaintiff taken on the 30th day of April, 1894, is as follows:

THEODORE HARRIS, being duly sworn and further cross-examined by Mr. Helm as attorney for the plaintiff deposed as follows:

1. Were you a director of the Ohio Improvement & Contract Company?

A. Nominally, yes, sir.

2. When did you become a director?

A. About the time the company was organized.

3. How long did you continue a director?

A. I don't know. I don't remember.

3. Did you cease to be a director before March, 1890?

A. I think not.

5. Did you cease to be a director before the assignment of the company to the Louisville Trust Company?

A. I am not sure. I was absent from the city and country most of the time in Europe, during the time the contract company was in existence, and I really think that they elected me continuously without consulting me.

6. You were here about January, 1890, were you?

A. Yes, sir.

7. Now, having that date fixed in your mind can you state whether you were then continuously from that time until after the Breyfogle administration came into power?

A. Yes, sir; I know that I was. I know that I was here when the Breyfogle administration came into power.

8. Can you with reference to that date, fix how long after that approximately you stayed in town?

A. I think I was in town until —, with some absences until August of that year.

9. 1890, Mr. Harris, you say you were a director, nominally. Did

you or not interest yourself to obtain, and did you not obtain subscriptions to those bonds for the contract company?

A. I did.

10. Did you attend some of the meetings of the directors of that company?

A. A few of them in the early history of the company.

11. Did you attend some of the meetings about the time this contract was obtained or made, between the improvement company and the Louisville, New Albany & Chicago Railway Company?

A. I don't remember.

12. The minute book, I presume, will show?

A. I suppose the minute book will be correct.

13. Did you ever at any time have any of the guaranteed bonds of the R., N., I. & B. R. R. Co., in pledge to your bank bearing numbers above 600?

A. I don't remember. I don't know.

14. Did you ever at any time have any guaranteed bonds of that company in your bank, under pledge or otherwise, except the bonds mentioned in your answer?

A. I don't remember what my answer in that respect was. That answer was given some months ago. Whatever that answer is was true as I now suppose. I cannot remember numbers of bonds, and will say that our bank in lending upon bonds makes no record of the numbers.

15. Do you know what is the date of your first subscription for bonds?

A. I do not. The subscription paper in the hands of the contract company will show. I was one of the earliest subscribers, I know. The date could probably be ascertained from this fact—Judge Richards was visiting New York, and on his return he stated to me and to others that he had negotiated a lease of the R., N., I. & B. R. R., with the Monon, and that the directors of the Monon had subscribed for, or agreed to take so many of the new bonds, and the bonds were to be guaranteed by the Monon Railroad Company. Upon that statement, I, myself subscribed for bonds, not doubting that the statement was true.

16. That the bonds would be guaranteed, but they had not been guaranteed?

A. I am not sure whether the bonds were guaranteed at that moment or not, whether the guaranty was actually written on them at the moment of which I speak.

17. Can you approximate about the number of bonds that it was stated to you that these Monon directors would take?

A. I can only speak from memory. My memory is that ten or eleven directors had agreed to take \$100,000 of the bonds issued.

18. And it was shortly after this agreement in New York that you made this subscription?

A. It was shortly after.

Redirect examination by Mr. MILLER :

19. As I understand you, when you actually made the purchase of these bonds, the guarantee was then on them?

140 A. When I received the bonds and paid for them, the guaranty was on them.

20. Did you make your subscription with the understanding that the guarantee was to be on them when you paid for them?

A. When I paid my subscription I understood that the guarantee was then on them, or was to be put on them.

21. Was it on them when you got them?

A. It was on them when I got them and paid for them. I paid ninety cents on the dollar for them cash, the whole subscription price. That is the price that all of us paid. I bought them because Judge Richards stated that the directors were going to hold them until they went to about 105, and then probably some would sell, and perhaps others would keep them altogether. I understood they were buying them for investment. They expected them to go to 105.

22. Could you fix the date of those two large loans to the Ohio Valley Improvement & Contract Company, upon which you took those bonds as collateral that the bank afterwards acquired by purchase?

A. No, sir. I could at the office, but I cannot now.

23. Will you determine those dates and give them to the stenographer? Will you make an effort to see if you can determine the fact, and then will you inform the stenographer?

A. I will.

By Mr. HELM :

24. If you obtain the information requested by Mr. Miller, you will please make a written statement of it, and give notice to me when you give it to the stenographer so that I may if I wish continue my cross-examination.

By Mr. MILLER :

25. If those two loans were made originally as a call loan, would that interfere with your fixing the date?

A. The last loan I know, was not made as a call loan. As to the first loan I am not sure, whether it was first as a call loan and then subsequently a time loan, or whether it was originally a time loan. If the loan was a call loan, it would interfere with the fixing of the date of the loan.

Q. Please explain what you mean.

A. Call loans are not so much defined in our books as time loans. They are entered simply as memoranda, with the note attached to the collateral, and the collateral not fully described, it not being expected that it will continue more than a few days.

27. Are they entered up at large in your bill book?

A. They are not entered in our bill book at all.

141 May 16th, 1894, Mr. Miller of counsel for the Louisville Banking Company this day handed me the letter of Theodore Harris, Esq., which is hereto attached, as his answer to interrogatory No. 23 of this deposition. I thereupon notified Mr. Helm of counsel for plaintiff who directed me to attach said letter to the deposition and file the same.

The letter above referred to is as follows:

(Letter-head of Louisville Banking Company.)

LOUISVILLE, KY., May 16, 1894.

Mr. Graham, Louisville, Ky.

DEAR SIR: As requested by counsel, I have had the bank's books examined, and they show that the Louisville Banking Co. made two loans to the Ohio Valley Improvement & Contract Co., secured by Beattyville bonds, viz:

1. \$25,000 loaned May 15, 1890, and secured by 62 bonds; and
2. \$25,000 loaned May 21, 1890, and secured by 63 bonds.

We have no way of determining how many of each set of bonds were guaranteed bonds, as our records do not give the individual numbers of the bonds, but the guaranteed bonds now owned by the bank are included in two sets. As before stated, I bought and paid for my own guaranteed bonds on or about January 2, 1890.

Yours truly,

THEODORE HARRIS.

J. M. FETTER being duly sworn and examined by Mr. Crawford for the complainant deposed as follows:

Q. State your name, occupation and residence?

A. My name is J. M. Fetter. I am president of the Kentucky National bank, and reside in Louisville, Ky.

Q. Were you officially connected with the Louisville, New Albany & Chicago Railway Co. prior to March, 1890; if so in what capacity?

A. Yes, sir; I was a director of the Louisville, New Albany and Chicago Railway Co. prior to 1890.

Q. Were you present at the meeting of the board of directors of the Louisville, New Albany & Chicago Railway Co. which voted the contract between that company and the Ohio Valley Improvement & Contract Co.?

142 A. Yes, sir; I was present at that time.

Q. Were you interested in the Ohio Valley Contract & Improvement Co.?

A. No, sir; I was not.

Q. You had no stock or any interest in it?

A. I had no stock, and no interest whatever.

Q. You became, did you not, a subscriber for certain bonds of that company?

A. Yes, sir.

Q. Bearing the guarantee of the Louisville, New Albany & Chicago Railway Co.?

A. Yes, sir; I was a subscriber.

Q. The consideration for the guarantee by the New Albany Company of the bonds of the Beattyville Company owned by the improvement company was the delivery to the New Albany Company of seventy-five per cent. of the stock of the railroad company, was it not—the Beattyville Railroad Company?

A. I don't remember positively. My recollection is though that that was the contract.

Q. You mean by that that you have forgotten the percentage of the stock?

A. Yes, sir.

Q. The sole consideration was the transfer of a certain amount of the stock of the railroad Co.?

A. That is my recollection.

Q. How many of those bonds did you take under the subscription?

A. Twenty-five.

Q. Do you remember when you took them?

A. I do not. I could not state the time.

Q. How long did you hold them?

A. I did not hold them at all. I had them delivered and immediately transferred them to brokers through whom I sold them.

Q. Through what brokers, or to what persons did you sell them as near as you can remember?

A. Really, I don't remember now to whom.

Q. Cannot you give any of the names?

A. My recollection is that I sold ten of them to W. G. Osborne, and the others I cannot place now—to whom they were sold.

Q. You have never held any of the guaranteed bonds since that time?

A. No, sir; not individually.

Q. The bank has held some and now holds some?

A. Yes, sir; the bank now holds some as collateral.

Q. How many?

143 A. I could not say, probably twelve or fifteen.

Q. For any but one party?

A. Yes sir; I think we hold for Major Richards, and *and* I believe for Mr. Holman. That is all that I can remember.

Q. You hold as collateral then the bonds of Bernard Holman?

A. I think we hold one bond of his.

Q. Who else?

A. A. E. Richards. That is all I remember now.

Q. Didn't you have some of these bonds for Mr. Carson?

A. No, sir.

Q. Did you ever hold more than the one bond you now hold for Mr. Holman?

A. I think not. I don't think he borrowed money from us only on that bond.

Q. Do you remember how much you were a subscriber for?

A. \$100,000.

Q. But there were only twenty-five taken up?

A. Yes, sir.

Q. That represents your connection with this transaction?

A. Yes, sir.

The affidavit of William Dowd is as follows:

In the Circuit Court of the United States for the District of
Kentucky.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, }
Complainant, }
against }
THE OHIO VALLEY IMPROVEMENT & CONTRACT COMPANY *et al.*, }
Defendants. }

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

William Dowd, being duly sworn, says: I was during the year 1889, the president and one of the directors of the Louisville, New Albany & Chicago Railway Company, and took part in the meeting of directors on or about the 8th of October, 1889, at which the guaranty of the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company by the Louisville, New Albany and Chicago Railway Company was authorized.

There was at that time no agreement or understanding, express or implied, direct or indirect, pursuant to which I was to receive or to take any of the said bonds or any interest therein. I had at that time no intention to take any of the said bonds. There was not at that time any agreement to my knowledge on the part of any of the directors of the Louisville, New Albany & Chicago Railway Company, to take or to receive any of the said bonds.

The proposition of the Ohio Valley Improvement Company to give the Louisville, New Albany & Chicago Railway Company, seventy-five per cent. of the stock of the Beattyville Company, in consideration of a guaranty of the Beattyville Company's bonds, was received, entertained and acted upon by the directors of the Louisville & New Albany Company, solely in the interest of the Louisville & New Albany Company, and in pursuance of a settled policy of the then existing management, which had theretofore proved very beneficial to the company. That management took charge of the road in the year 1884. In that year the gross earnings of the company amounted to \$1,564,436.39, the net earnings to \$199,292, and the operating expenses to \$1,365,144.39, while the insurance, rentals and interest amounted to \$653,021.38, leaving a deficit of \$453,729.38. The company was on the verge of bankruptcy and its stock was selling at about 15 cents on the dollar.

We were satisfied that the company had been brought to this condition by the fact that its more active and progressive rivals had absorbed a large part of the business which naturally belonged to it, and that an active and progressive policy afforded the only possibility of saving the road to the stockholders. We followed that policy, and the result is shown in the following table of earnings and expenses:

	1884.	1885.
Gross earnings.....	\$1,564,436 39	\$1,680,454 61
Operating expenses	1,365,144 39	1,332,035 90
Net earnings....	199,292 00	348,418 71
	1886.	1887.
Gross earnings....	\$1,919,189 53	\$2,295,623 82
Operating expenses.....	1,278,527 73	1,489,698 49
Net earnings.....	640,661 80	805,925 33
145	1888.	1889. About—
Gross earnings	\$2,292,782 40	\$2,495,000 00
Operating expenses	1,424,676 93	1,545,000 00
Net earnings.....	868,105 47	950,000 00

From a deficiency of over \$450,000, in 1884, we earned a surplus of \$105,000 in 1889. This was accomplished by active efforts to bring business into the road, in the course of which we purchased the Bedford & Bloomfield road, built the French Lick Springs road, and leased the Louisville Southern, all of these contributing largely to the increase of the business of the main line, and were approved and ratified by the stockholders of the company. In pursuance of the same policy and with the same object, and with no other object or interest, we, in 1889, made a further lease of the Lexington extension, branch of the Louisville Southern, and agreed to guarantee the Beattyville bonds upon acquiring three-fourths of the Beattyville stock.

I did not subscribe or agree to subscribe for any of those for several weeks or more than a month after the meeting of October 8th, when it was represented to me, that the effort to place the bonds was proving unsuccessful and was suffering because the persons interested in the Louisville and New Albany Company, who would naturally be familiar with the prospects and value of the Beattyville enterprise did not seem to have confidence enough to risk their own money in it. I then for the purpose of helping along the undertaking, and very reluctantly, subscribed for 100,000 of the bonds. I did that not because I wanted them or wished to make such an investment, but because I was willing to risk something for the purpose of aiding to secure the benefit for the Louisville and New Albany Company, which I was confident the building and control of the Beattyville road would prove to be.

Mr. Henry H. Cook and Mr. James A. Roosevelt are now, and ever since before the 1st of January of this year, have been absent in Europe.

WM. DOWD.

Subscribed and sworn to before me this 17th day of April, 1890.

[SEAL.]

EDWIN B. ROOT,

Notary Public (133), New York County.

The affidavit of John B. Carson is as follows:

146 United States Circuit Court, District of Kentucky.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY	} Affidavit.
COMPANY, Complainant,	
<i>vs.</i>	
THE OHIO VALLEY IMPROVEMENT & CONTRACT COM-	
PANY <i>et al.</i> , Defendants.	

The affiant, John B. Carson, one of the defendants in the above-styled suit, states on oath that he was one of the directors, as well as the vice-president and general manager, of the L., N. A. & C. R. R. Co., during the year 1889, and until the 12th day of March, 1890. Some time during the spring of 1889, A. E. Richards, president of the Ohio Valley Improvement & Contract Company, brought to affiant's notice the R. N. I. & B. R. R. which was then under construction.

At the time the New Albany road had leased and was operating the main stem of the Louisville Southern R. R. and it was expected would lease and operate the Lexington extension of the same road which was then being built. Said Richards represented to me that the Beattyville road would branch off from the Louisville Southern at Versailles and would be a virtual extension of that line for about ninety miles, passing through three rich Blue Grass counties, and thence into the coal, iron, and timber regions of eastern Kentucky. He wished me to aid him in negotiating the sale of his bonds so as to insure the early completion of the road. I took the matter under consideration and had several interviews with him both in Kentucky and Chicago in regard thereto. I examined in person, a considerable part of the line and some of my subordinate officers rode over the remainder. This examination satisfied me that the Beattyville road would be a valuable feeder for the entire New Albany system, and from that time I took considerable interest in aiding him to effect a sale of the bonds. I introduced him to some bankers and other parties in Chicago, and recommended the enterprise, but he failed to dispose of the bonds to them. He then suggested the formation of a syndicate of investors to purchase one-half of the bonds. I told him we might get some of them subscribed for in Chicago, but that New York would be the better place. I

147 agreed to notify him when I would next visit that city, which I did. We met there, when I introduced him to Mr. Dowd, the president, and Mr. Root, the chief attorney of the New Albany road. The matter was talked over, but nothing accomplished. Later on we again met in New York, when he tried to get Mr. Roosevelt and Mr. Astor to take an interest in the matter. Mr. Roosevelt suggested that before taking any interest ourselves or recommending the investment to others an expert should be employed to examine the road and the resources of the country. He was requested to select the expert, and some one recommended to him Mr. Geo. S. Griscom, of Pittsburgh. The affiant had no personal acquaintance with Mr. Griscom, and believes that up to that

time he was not personally known to either Messrs. Dowd, Root, Richards, or Roosevelt. Mr. Griscom received his instructions from Mr. Roosevelt, made his examination, and reported the result to Mr. Dowd, as president of the Bank of North America, on July 24th, 1889. Prior thereto President Richards had prepared a written proposition for the sale of one-half of the bonds, dated June 19th, 1889, and left it with some one in New York, probably with Mr. Root. At any rate, Mr. Root, being about to make an extended trip to the far West, handed me said paper with his name signed thereto, to be used in case the syndicate was completed to take one-half of the bonds upon the terms therein specified. It was not contemplated that those of us interested in the New Albany road should do more than start the subscriptions and recommend the same to outsiders so as to secure the completion of the road. I never signed or agreed to sign that paper for any number of bonds, although I would have done so had there been any prospect of completing the syndicate; but before this could be done Hon. Robert R. Hitt, now member of Congress from Illinois, who was then a director in the New Albany Company, and continued to be until the 12th of March, 1890, after making personal examination of the property, suggested that the Beattyville road ought to belong to the New Albany system by some kind of contract between the two roads, and that the majority of stock ought not to be distributed among strangers. He suggested that it would be well for us to consider the policy of endorsing the bonds, in consideration of a majority of the stock. This was early in Sept., 1889. Shortly after this suggestion was made the proposition by which the syndicate was to obtain 51 per cent. of the stock was abandoned, and, so far as the affiant knows, no one ever signed the agreement, except

148 Mr. Root, and he signed it upon the condition above mentioned. I never gave said Richards any directions as to the proposition of the bonds or mortgage to carry out said written proposal or for any other purpose, and none of the other directors did, so far as I know or believe. On the 8th of October, 1889, the directors of the New Albany Company held a meeting in their offices in New York. President Richards was there upon the invitation of myself and others. He appeared before the board, explained the affairs of his company, the progress of the work, and the resources of the country. At his request we invited Prof. John R. Proctor, State geologist for Kentucky, to come before the board and be heard upon the resources of the country through which the road passed. After hearing Prof. Proctor, President Richards was recalled and a discussion arose as to what kind of a contract could be made. Among other things, we wanted the entire stock in case we made the endorsement, but when this was found impossible, on account of the county subscriptions already made, 75 per cent. was named, and the other details of the contract subsequently executed were agreed upon, and the board, including Mr. Postlewaite, who is now vice-president, voted unanimously to guarantee the bonds. At no time before this meeting nor during the same, did I have any understanding with President Richards, or any one representing him,

that the original proposition shall be altered or that I would vote for the resolution guaranteeing the bonds, nor do I believe any other director had such agreement or understanding. At the time of said meeting I had no contract or understanding with said Richards, by which I was to subscribe for any of said bonds, in case they were guaranteed. I believed that the Beattyville road would prove a valuable acquisition to the New Albany system, and for that reason voted for the resolution, and believe the other members of the board were controlled by the same motive. It had been the settled policy of the New Albany road for years to get an outlet across Kentucky to the south and to the seaboard, and I believed that the acquisition of the Louisville Southern and the Beattyville roads to be a long stride in that direction. I left New York for Chicago immediately after the meeting of October 8th. I did not see the proposition for the new syndicate until about the 1st of November, 1889, when President Richards presented it to me in Chicago and requested me to sign it, which I did. In subscribing for the bonds I considered that I was paying their full market value, and would not have made the subscription except for the purpose of
149 advancing the interests of the New Albany system. At the same meeting of the board on October 8th, a resolution was passed authorizing the lease of the Lexington extension of the Louisville Southern, and to the best of my recollection that resolution was passed before the one guaranteeing the Beattyville bonds, but of this I am not sure. The affiant believes that with a continuous line from Chicago to Beattyville, the short link between the latter point and the Virginia and Tennessee systems of roads beyond the Cumberland would soon be built, giving the long-desired connections, as well as the benefit of the traffic along the line. The contract by which the New Albany road agreed to guarantee the bonds of the Beattyville road was not drawn up until after the board meeting on the 8th of October, and could not have been, because its terms were not fixed until said meeting, nor was it understood what they should be. Under that contract the Ohio Valley Company was to protect the interest on the bonds for one year after the completion of the road. It was and still is my opinion that after that period, if not before, the Beattyville road will be able to earn its fixed charges, including the interest. I have had many years' experience in railroading. I believed that the New Albany road would become the owner of the Beattyville road without the expenditure of a dollar.

John B. Carson, being duly sworn, says that the statements in the foregoing affidavit are true.

JOHN B. CARSON.

Subscribed and sworn to before me this 17th day of April, 1890.

[SEAL.]

C. V. CHISNELL,
N. P., Jeff. Co.

In the Circuit Court of the United States, District of Kentucky.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,	}
Complainant,	
<i>against</i>	
THE OHIO VALLEY IMPROVEMENT & CONTRACT COMPANY <i>et al.</i> ,	}
Defendants.	

SOUTHERN DISTRICT OF NEW YORK,	}	ss :
<i>City and County of New York,</i>		

150 Elihu Root, being duly sworn, says: I was, during the year 1889, one of the directors of the Louisville, New Albany & Chicago Railway Company. I took part in the meeting on or about October 8th, 1889, when the guarantee of the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company was authorized.

Half of those bonds had been offered for sale in New York in the early summer of 1889, with an agreement that fifty-one per cent. of the stock should go with the bonds. At that time I expressed a willingness to become one of a syndicate to purchase these bonds, and left with Mr. Dowd my signature to a proposed syndicate agreement. No one else, however, signed the paper, and it was never delivered and the matter fell through.

The proposition which was made in the following October to the Louisville & New Albany Company to give that company three-fourths of the stock in consideration of its guaranty was a new and independent proposition, having no relation whatever to the proposed arrangement of the previous June.

I voted to accept the proposition because I believed it to be exceedingly advantageous for the Louisville & New Albany Company, and was moved thereto by no other consideration than the interests of that company.

There was at that time no agreement, expressed or implied, direct or indirect, under which I was bound to take or was entitled to have any of the said bonds.

The Ohio Valley Improvement Company was then, and continued, after the execution of the agreement for guaranty, at full liberty to sell the said bonds to whomsoever they pleased and for whatever price they would get. I had not, nor, to my knowledge or belief, did any of the directors have any rights against that company, or rest under any obligations to it in respect of the said bonds.

I should think that it was a week or so after the 8th of October when the guaranty was authorized by the directors, and after the agreement for guaranty was executed, that the subscription paper for the bonds was presented to me and I subscribed for fifty. Several weeks after that, the subscription not being filled, and the effort to place the bonds in New York appearing likely to fail unless some additional impetus was given to it, and after a visit to New York by Judge Richards and Professor Proctor, the State geologist of Kentucky, and receiving further information from them as to the

merits of the enterprise, I subscribed for fifty more of the said bonds. This was at the same time that Mr. Dowd made his subscription.

At that time, to my knowledge, the bonds had been offered through brokers and by direct application, very generally, in the city of New York, at the same price at which I subscribed. Most of the persons applied to had refused to invest in them, and only about one-half of the amount offered had been taken. Most of the subscriptions which had been made had been procured by the earnest efforts of persons interested in the Louisville & New Albany Company, who sought to place the bonds because of the benefit which that company would derive.

ELIHU ROOT.

Subscribed and sworn to before me this 7th day of April, 1890.

[SEAL.]

EDWIN B. ROOT,

Notary Public (133), New York County.

In the Circuit Court of the United States, District of Kentucky.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,	}
Complainant,	
against	
THE OHIO VALLEY IMPROVEMENT & CONTRACT COMPANY <i>et al.</i> ,	
Defendants.	}

Joel B. Erhardt, being duly sworn, says: I was, during the year 1889, one of the directors of the Louisville, New Albany and Chicago Railway Company. I took part in the meeting on or about October 8th, 1889, when the guaranty of the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company was authorized.

I had, at that time no agreement or understanding, expressed or implied, direct or indirect that I should take or should be entitled to receive any of the said bonds. I had never had anything to do with any syndicate or arrangement regarding the said bonds, and I considered and acted upon the proposition for guaranty, solely with reference to the interests of the Louisville and New Albany Company.

Several weeks after that, I was asked to subscribe for some of them, and I subscribed for twenty. I was quite indifferent whether I took them or not as I considered the price to be fully as much as they were worth. I subscribed for them not because they were a particularly good investment, but because I wanted to help along an enterprise which I thought would benefit the Louisville and New Albany Company.

JOEL B. ERHARDT.

152 Sworn and subscribed to before me, a notary public in and for the District of Columbia, this eighteenth day of April, 1890.

[SEAL.]

J. Y. KNIGHT,

Notary Public.

DISTRICT OF COLUMBIA, ss:

Clerk's Office of the Supreme Court of the District of Columbia.

I, R. J. Meigs, clerk of the said court, do hereby certify that J. Y. Knight, Esq., whose name is subscribed to the certificate of the proof or acknowledgement of the annexed instrument in and for the said District, dwelling therein, commissioned, sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of said J. Y. Knight and verily believe that the signature to the said certificate of proof or acknowledgment is genuine, and the said instrument is executed and acknowledged according to the laws of this District.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 18th day of April, A. D. 1890.

[SEAL.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

This deed made and entered into this 24th day of January, 1881, by and between the Merchants' National Bank of Cincinnati, Ohio, a corporation duly organized under the national bank act and Daniel J. Fallis, trustee of Covington, Kentucky, of the first part and the Louisville, New Albany and Chicago Railway Company, of the city of Louisville, Kentucky, of the second part.

Witnesseth, that the said parties of the first part for and in consideration of the sum of five thousand five hundred dollars cash in hand paid the receipt of which is hereby acknowledged do hereby sell, grant and convey to the said second party its successors and assigns the following-described property, viz: A certain lot or parcel of land lying and being in the city of Louisville, Kentucky, and bounded as follows, to wit: Beginning at a point on the south line of Duncan street distant one hundred and eighty (180) feet west of the southwest corner of Duncan and Fourteenth streets running thence northwardly and fronting the south side of Duncan street sixty (60) feet and extending back southwardly of equal width one

hundred and ninety-five (195) feet to an alley or Columbia
153 street, being the same property conveyed said Daniel J. Fallis, trustee, by the Merchants' National Bank of Cincinnati, Ohio, by deed dated April 18th, 1880, of record in Deed Book Number 232, page 599, Jefferson county court clerk's office and the same conveyed said Merchants' National bank by the sheriff of Jefferson county, Kentucky, by deed of record in Deed Book Number 145, page 457, Jefferson county court clerk's office. To have and to hold the same with all the appurtenances thereon to the said second party, its successors and assigns forever with covenant, warranty and against all incumbrances except the taxes of 1881, which said second party is to pay.

Witness my hand and seal the day and year first above written.

[SEAL.]

D. J. FALLIS,
Trustee for the Merchants' Nat'l B'k of Cincinnati, Ohio.

In witness of the foregoing indenture the Merchants' National Bank of Cincinnati, Ohio, has caused its corporate seal to be affixed hereto by its president, and this deed to be signed by its president and attested by its secretary pursuant to vote of its board of directors regularly made and entered on its corporate records.

THE MERCHANTS' NAT'L B'K OF CINCINNATI, OHIO,

By D. J. FALLIS, *P't.*

[Mer. Nat'l Bank Seal of Cin., O.]

Attest: H. C. YERGASON,

Cashier Merchants' National Bank of Cincinnati, Ohio.

STATE OF OHIO, }
County of Hamilton, City of Cincinnati, } *act:*

I, James D. Henry, a notary public in and for the county of Hamilton and State of Ohio aforesaid, duly appointed and commissioned and authorized by law to take and certify acknowledgements of deeds and other writings, do hereby certify that the foregoing deed from the Merchants' National Bank of Cincinnati, Ohio, a corporation, and Daniel J. Fallis, trustee, to the Louisville, New Albany and Chicago Railway Company, was this day produced to me in my office, in the county and State aforesaid, by the grantors, and said deed was then and there signed and sealed and acknowledged by said Daniel J. Fallis to be his act and deed as such trustee, and to be the act and deed of the said Merchants' National Bank of Cincinnati, Ohio, by him as its president, duly authorized in the premises, and that the seal thereto attached is the seal of said bank and that said deed was executed and for the uses and purposes therein mentioned and they consented that the same be recorded and at the same time H. C. Yergason, cashier of said bank, affixed the official seal of said bank to said deed and attested the same by his signature as such cashier.

Given under my hand and notarial seal this twenty-fifth day of January, 1881.

[SEAL.]

JAMES D. HENRY,
Notary Public for Hamilton County, Ohio.

I, Wm. E. Loran, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that on this day the foregoing deed was produced to me in my office and that I have recorded it and the foregoing certificates in my said office.

Witness my hand this 17th day of February, 1881.

WM. E. LORAN, *Clerk.*

STATE OF KENTUCKY, }
County of Jefferson, } *act:*

I, Geo. H. Webb, clerk of the county court within and for the county and State aforesaid, do certify that the foregoing 4 pages contain a true, correct and complete copy of deed between Nat'l Bank of Cincinnati, Ohio, and the Louisville, New Albany & Chi-

ago Railway Company together with the certificates of acknowledgment and record thereto attached, as the same is now of record in my office as clerk aforesaid. Said deed is recorded in Deed Book No. 239, page 82, county clerk's office aforesaid.

In testimony whereof, and that the foregoing — truly and completely copied from the records of the court aforesaid, I, Geo. H. Webb, clerk of said court, hereunto set my hand and affix the official seal of Jefferson county, Kentucky, of which I am the custodian, at Louisville, Kentucky, this 19th day of April, 1890.

[SEAL.]

GEO. H. WEBB,

Clerk Jefferson County Court, Ky.

This deed between Bridget Giltenan (formerly Scanlin), widow Patrick Giltenan, and Annie his wife, and Catherine Giltenan, unmarried, of the first part, and the Louisville, New Albany and Chicago Railway Company, all of the city of Louisville, Kentucky,

of the second part, witnesseth that said party of the first part
155 in consideration of forty-six hundred dollars cash in hand paid by said second party, the receipt of which is hereby acknowledged, do hereby sell, grant and convey to the party of the second part, its successors and assigns, the following-described property, viz: A certain lot or parcel of land lying and being in the city of Louisville, Kentucky, and bounded as follows, to wit: beginning at a point in the south line of Duncan street, distant one hundred and fifty (150) feet west of the southwest corner of Duncan and Fourteenth streets, running thence westwardly and fronting the south line of Duncan street thirty (30) feet and extending back southwardly of equal width one hundred and ninety-five (195) feet to an alley, being the same property conveyed to said Bridget Giltenan or Scanlan by J. P. Hall and wife by deed dated April 25th, 1853, and of record in Deed Book 86, page 88, Jefferson county court clerk's office. To have and to hold the same with all the appurtenances thereon between the second party, its successors and assigns forever, with covenant of general warranty. In testimony whereof witness our signatures this 27th day of April, 1881.

^{her}
BRIDGET + GILTENAN.

^{mark.}
KATE GILTENAN.
PAT GILTENAN.
ANNIE GILTENAN.

Witness as to Bridget Giltenan—
S. S. MEDDIS.

I, Wm. E. Loran, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that on this day the foregoing deed was produced to me in my office and acknowledged and delivered by Bridget Giltenan, Kate Giltenan, Pat Giltenan, and Annie, his wife, parties thereto, to be their act and deed.

Witness my hand this 26th day of April, 1881.

WM. E. LORAN, *Clerk,*
By JOHN C. LORAN, *D. C.*

I, Wm. E. Loran, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that on this day the foregoing deed was again produced to me in my office and that I have recorded it and the foregoing certificate in my said office.

Witness my hand this 23rd day of May, 1881.

WM. E. LORAN, *Clk.*

STATE OF KENTUCKY, }
County of Jefferson, } *set:*

I, Geo. H. Webb, clerk of the county court within and for
156 the county and State aforesaid, do certify that the foregoing
4 pages contain a true, correct and complete copy of deed
between Bridget Giltenan and the Louisville, & New Albany &
Chicago Railway Company, together with the certificate of ac-
knowledgegment and record thereto attached, as the same is now of
record in my office as clerk aforesaid.

Said deed is recorded in Deed Book No. 241, page 89, county clerk's
office aforesaid.

In witness whereof, and that the foregoing — truly and completely
copied from the records of the court aforesaid, I, Geo. H. Webb,
clerk of said court, hereunto set my hand and affix the official seal
of Jefferson county, Kentucky, of which I am the custodian, at
Louisville, Kentucky, this 19th day of April, 1890.

[SEAL.]

GEO. H. WEBB,

Clerk Jefferson County Court, Ky.

Jefferson County Court.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY CO., Plaintiff, }
vs.
JOHN D. O'LEARY, Defendant. }

The Louisville, New Albany & Chicago Railway Company, states
that it is a corporation, and that it is duly empowered by its charter
by an act of the General Assembly of the Commonwealth of Ken-
tucky to purchase, lease, or condemn in said State such real estate
as may be necessary for railway, switches, side tracks, depots, yards
and other railway purposes, and to construct and operate a railroad
in said State.

Plaintiff further states that John D. O'Leary aforesaid is the
owner of a lot of land in the city of Louisville, in Jefferson county,
State of Kentucky, described as follows, to wit:

Beginning at a point on the north side of Rowan street, 30 feet
west of Fourteenth street, extending thence westwardly on Rowan
street 30 feet, and extending back northwardly of same width 109
feet parallel with Fourteenth street, being the same property con-
veyed to said O'Leary by deed recorded in the office of the clerk of
this court in Deed Book No. 234, page 105.

157 Plaintiff further states that the aforesaid land is necessary
for the railway use and purposes of said railway company
for the construction of depots, tracks and railway yards and other
railway purposes of said company, and that said company has en-

deavored to purchase the said property from the said O'Leary, and is unable to contract with him for the purchase thereof, and the said O'Leary refuses to negotiate with the said company, for the sale to it of said property, or any part thereof.

Wherefore, the said company prays this honorable court to appoint commissioners to assess the damages the said O'Leary may be entitled to receive as compensation for said property, and that the same may be condemned to the said purposes of said company, and that the title to said property may be vested in said company.

E. F. TRABUE,

Att'y for L., N. A. & C. R'y Co.

STATE OF KENTUCKY, {
Jefferson County. }

To the hon. judge of the Jefferson county court:

The undersigned commissioners appointed by said court to award to the owner or owners the value of the land sought to be condemned for the uses of said railway company, and fully described as follows, viz: Beginning at a point on the north side of Rowan street in the city of Louisville, thirty feet west of Fourteenth street, extending thence westwardly on Rowan street 30 feet and extending back northwardly of same width one hundred and nine feet parallel with 14th street, being the same property conveyed to said O'Leary by deed recorded in the office of the clerk of said court in Deed Book No. 234, page 105, and also to award the damages if any resulting to the adjacent lands of the owner or owners considering the purpose for which it is taken. After being sworn as shown by the jurat herewith returned, and after having viewed and made examination of the above-described land, do make report as follows:

First. They find that said land belongs in fee-simple to John D. O'Leary.

Second. They award to said John D. O'Leary twelve hundred and twenty-five (1,225) dollars as the value of said lot of land above described to be taken by said railway company.

Thrd. They find that said J. D. O'Leary has no land adjacent to the above-described lot of land.

158 Fourth. They find that said J. D. O'Leary is a resident of this State, is a male adult, and is of sound mind.

All of which is respectfully submitted February 28th, 1887.

W. A. MERRIWETHER.
JOHN McATEER.
E. D. FRYER.

We ask an allowance for service of \$25 each.

STATE OF KENTUCKY, {
Jefferson County. }

County Court, Feb. 25, 1887.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, }
 Plaintiff,
vs.
 JOHN D. O'LEARY, Defendant. }

The plaintiff having filed in the office of the clerk of said court a description of certain real estate and interests therein claimed by defendants, which the plaintiff claims is needed for its use, and that the owner- thereof and plaintiff cannot contract for the purchase thereof, and the plaintiff having moved the court to appoint commissioners for the condemnation thereof, the court now orders that John McAteer, W. A. Merriwether and E. D. Fryer, impartial house-keepers of Jefferson county, be and they are hereby appointed commissioners to assess the damage to which said owners may be entitled to receive, who before acting shall be sworn faithfully and impartially to discharge their duties according to law. They shall then proceed to view the land proposed to be taken, and award to the owners thereof the value of the same which shall be stated separately and they shall also award the damages, if any, to said owners of adjacent land, considering the purposes for which it is to be taken, but shall deduct from the incidental damages the value, if any of the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed and report thereof in writing and file the same in the office of the clerk of said county court, stating their award, and describing therein the land condemned, give name and interest of each owner and whether said owners are now residents of this State, infant or of unsound mind, or married women.

The land proposed to be taken is described as follows: Beginning at a point on the north side of Rowan street in the city of
 159 Louisville, 30 feet west of 14th street, extending thence west-wardly on Rowan street 30 feet, and extending back north-wardly of same width 109 feet parallel with 14th street, being the same property conveyed to said O'Leary by deed recorded in the office of the clerk of this court in Deed Book No. 234, page 105.

STATE OF KENTUCKY, {
Jefferson County, } *act:*

We, John McAteer, W. A. Merriwether, and E. D. Fryer each do severally swear that we will faithfully and impartially discharge our duties under the foregoing order according to law.

JOHN MCATEER.
 W. A. MERRIWETHER.
 E. D. FRYER.

STATE OF KENTUCKY, }
Jefferson County, } *set:*

Subscribed and sworn to before me by John McAteer, M. A. Merriwether and E. D. Fryer this 26th day of February, 1887.

CHAS. D. GOEPFER,
District Circuit Court, Jefferson Co. Ct., Ky.

STATE OF KENTUCKY, }
Jefferson County, } *set:*

I, Geo. H. Webb, clerk of the county court within and for the county and State aforesaid, do certify that the foregoing pages, contain a true, correct and complete copy of court proceedings in the condemnation of lands belonging to J. D. O'Leary, to wit: the petition and report of commissioners, as the same is now of record in my office as clerk aforesaid. Said petition and report is on file in county clerk's office aforesaid.

In testimony whereof, and that the foregoing orders of court — truly and completely copied from the records aforesaid, I, Geo. H. Webb, clerk of said court, hereunto set my hand and affix the official seal of Jefferson county, Kentucky, of which I am the custodian, at Louisville, Kentucky, this 19th day of April, 1890.

[SEAL.]

GEO. H. WEBB,
Clerk Jefferson County Court, Kentucky.

160 STATE OF KENTUCKY, }
Jefferson County, } *set:*

I, W. B. Hoke, sole, and presiding judge of the county court within and for the county and State aforesaid, do certify that Geo. H. Webb, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, clerk of said court, duly elected and qualified, and that all of his official acts as such are entitled to full faith and credit, and that his foregoing attestation is in due form of law.

Given under my hand at Louisville, Kentucky, this 19th day of April, 1890.

W. B. HOKE,
Sole and Presiding Judge of the County Court, Ky.

STATE OF KENTUCKY, }
Jefferson County, } *set:*

I, Geo. H. Webb, clerk of the county court, within and for the county and State aforesaid, do certify that W. B. Hoke, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, sole and presiding judge of said court, duly elected, commissioned and qualified, and that all of his official acts of such are entitled to full faith and credit.

In witness whereof, I hereunto set my hand and affix the official

seal of Jefferson county, Kentucky, of which I am the custodian, at Louisville, Kentucky, this 19th day of April, 1890.

[SEAL.]

GEO. H. WEBB,
Clerk Jefferson County Court.

(Pages 471 to 513 inclusive stipulated out.)

The deposition of H. V. LOVING, taken on the 27th day of October, 1893, on behalf of Louisville Trust Co., is as follows:

By Mr. BOYLE, attorney for Louisville Trust Company :

1. State your name, residence, and occupation.

A. My name is H. V. Loving; residence, Louisville, Kentucky; occupation, president of the Louisville Trust Company.

2. Have you read the answer filed for the Louisville Trust Company in this case?

A. I have.

3. When did you read it last?

161 A. I read it last on yesterday.

4. Are the statements contained in that answer true?

A. They are true.

5. Does that answer correctly state the time, when, and the manner in which the Louisville Trust Company became the holder of the \$125,000 of bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company numbered from 1051 to 1175 inclusive?

A. It does.

6. Are the dates given correct, and are you in any way able to verify them?

A. The dates are correctly given, and were verified by me again on yesterday by a personal examination and comparison with the bonds of the company.

7. At the time you made the agreement mentioned in that answer, whereby you surrendered 216 unendorsed bonds and was to receive 125 endorsed bonds, and at the time you did receive the bonds, did you have any knowledge or information of any kind as to whether or not the directors of the Louisville, New Albany & Chicago Railway Company had ordered the guarantee to be endorsed at any meeting where there was less than a quorum?

A. None whatever.

Q. Did you have any knowledge or information about any action of the board of directors of the Louisville, New Albany & Chicago railway on the subject?

A. None.

9. Did you have any knowledge or information as to whether or not there had been any authority given by the stockholders of the Louisville, New Albany & Chicago Railway Company for the guarantee?

A. I had no information whatever on that subject.

10. Have you read the original bill of complaint in this case?

A. I have.

11. Did you at the time you made the arrangement for the delivery of the bonds mentioned above, or at the time that you received the endorsed bonds, have any knowledge or information about the negotiations between Mr. Richards, the president of the Ohio Valley Improvement & Contract Company, and the officers of the Louisville, New Albany & Chicago Railway Company, set out in the bill of complaint?

A. At the time that the Louisville Trust Company surrendered the 216 bonds referred to, I had been informed that there had been an agreement entered into by which the Louisville, New Albany & Chicago Railway Company had covenanted to guarantee the bonds of the R. N. I. & B. R. R. Company. I knew nothing whatever about any negotiations referred to between the Ohio Valley Improvement and Contract Company, and the directors of the Louisville, New Albany & Chicago Railway Company, by which they were to take certain of these bonds.

Cross-examination by Mr. HELM:

12. When did you actually receive the 125 guaranteed bonds?

A. The 125 bonds must have been received by the Louisville Trust Co., about the 17th of March, 1890.

13. You evidently speak now from inference, from the language of your answer. Give the facts upon which you draw the inference?

A. Upon the back of the note executed by the Ohio Valley Contract and Improvement Co., of date January 16th, 1890, for \$100,000 at six months after date thereof, there is an entry on the back of said note as follows:

"The bonds mentioned within were withdrawn by the Ohio Valley Improvement and Contract Co., and in lieu thereof said company has deposited as collateral on this note, 125 bonds, first mortgage, of the Richmond, Nicholasville, Irvine & Beattyville Railroad Co., numbers 1051 to 1175 inclusive, \$1,000 each, principal and interest guaranteed by the Louisville, New Albany and Chicago Railway Co. This March 17th, 1890. Signed, Ohio Valley Improvement and Contract Co., by Wm. Cornwall, Jr., treasurer."

14. There was a complete change of directory on the 11th of March preceding the taking of those guaranteed bonds, was their not?

A. I don't know.

15. Don't you know that Messrs. Dowd, Carson and party were displaced at a meeting of the stockholders on the 11th of March, and that the party with Dr. Breyfogle at the head was put into the directory on the 11th or 12th of March?

A. I know the directory was displaced, but I don't know when it occurred.

16. It is likely at that time, it being only a few days from the date of this displacement, that you knew all about it?

A. I knew about it as soon as it occurred.

17. There was very considerable publication in the papers at that time, was there not, especially in the Courier-Journal?

A. There was.

163 18. Of charges of fraud against the old board, and a general shaking up was promised?

A. I have no recollection about charges of fraud at that time. It was published pretty extensively that there had been an ousting of the old board and the election of the new one.

19. Did the bonds which you received bear evidence of the fact that they were endorsed immediately before the displacement of Dowd as president?

A. There was nothing in the nature of the indorsement indicating when it was done.

20. Do you mean that the indorsement was not dated?

A. In the fact of the indorsement itself. I don't recollect the date of the indorsement, but there was nothing indicating when it was put on, unless a date shows it.

21. Do you recollect whether the indorsement does show the date?

A. I don't recollect now, but I can go and get one of the bonds. I don't recollect about the date. I have now made an examination, and the indorsement bears no date of guaranty.

22. You did know, however, didn't you, that they were guaranteed just a few days before you took the bonds?

A. Well, I didn't know when the guaranty was put on there at all. I only knew they were guaranteed when they came into our possession.

23. When did you surrender the 216 bonds?

A. About November 20th, 1889.

24. What did you hold as collateral for your loan between that and the 17th of March, 1890?

A. We held unendorsed bonds—that is, bonds not guaranteed, I mean.

25. I understand you to say that you surrendered the unguaranteed bonds on the 20th of November?

A. Other bonds unguaranteed were put in their place.

26. How long did you hold those?

A. We held those until the 17th of March, 1890, when the guaranteed bonds were received by us.

27. Before taking those bonds, with the guaranty of the company, did you have investigation made into the power of the Louisville, New Albany and Chicago railway to guarantee the bonds?

A. I did not.

28. Didn't it occur to you that a foreign corporation might not have the power to guarantee a resident or domestic corporation's bonds?

A. I knew the Louisville, New Albany and Chicago Railway Co. had been incorporated under an act of the Kentucky legislature, but so far as its rights and powers to make this guaranty were concerned, it really did not occur to me.

164 29. When you say that you knew it was incorporated under an act of the Kentucky legislature, you mean that is your construction of the act?

A. I know an act had been passed purporting to incorporate the Louisville, New Albany and Chicago Railway Co. under the laws of Kentucky.

30. But you didn't look into the question of power?

A. I didn't look into that question at all.

31. Your first loan was secured by 216 bonds?

A. Unguaranteed.

32. Was there anything received in addition to the 125 guaranteed bonds when you took those?

A. Not on that note.

33. Were there 216 pledged to secure that particular note, and no other?

A. The 216 bonds were pledged to secure the note for \$100,000, and no other. After the 125 guaranteed bonds had been received by us, we permitted the improvement Co., to retain the remainder of the bonds between the 125,000 and 216,000.

34. Did you make that agreement before the reception of those bonds or afterwards?

A. It is probable that it was made before.

35. Why do you think so?

A. I think it quite likely that it was made before, simply because we did retain only that number of bonds, and therefore, I infer the agreement must have been prior to that time.

36. Who made that agreement?

A. It must have been myself.

37. Don't you know whether you made it before or afterwards?

A. I really don't recollect. I have no doubt that it was made before.

38. How many times was this note for \$100,000 renewed, after you received the 125 bonds?

A. It was renewed on July 26th, 1890, and renewed December 5th, 1890, and March 23d, 1891. On March 23rd, 1891, it was increased to \$125,000. The renewal bearing date March 17th, 1891, for \$125,000, the collateral including the 125,000 endorsed bonds with other first-mortgage bonds R., N., I. & B. R. R., making a total of 400 bonds as collateral on it at that time.

39. What was the financial condition of the Ohio Valley Improvement and Contract Company at the time of the first renewal after March 17th, 1890?

165 A. Solvent.

40. What was its condition at the second renewal?

A. Solvent.

41. The third renewal?

A. Solvent.

42. In other words, you think that on each one of those occasions, if you had refused to renew, and asked for payment, that you could have gotten it?

A. I don't know that I could.

43. That is the result of their being solvent, is it not?

A. So far as I know, they were solvent. They had never been declared insolvent.

44. You believed them to be solvent?

A. I had no reason to doubt they were solvent.

Redirect examination by Mr. BOYLE:

45. At the time you surrendered the 216 bonds, did you have any agreement or understanding as to what bonds should be substituted for them, and how many?

A. We had an agreement that the bonds of the R. N. I. & B. R. R. Co., to the number of 125,000, guaranteed by the Louisville, New Albany & Chicago Railway Co., should be deposited in lieu of them, but no agreement as to the numbers that those bonds should bear.

46. You had that agreement at the time you surrendered the 216 bonds?

A. We did.

Recross-examination by Mr. HELM:

47. As I understand you, the 216 bonds were surrendered in November, and you received other bonds in their stead, other bonds unguaranteed.

A. That is true. They were bonds that were unguaranteed, and when we surrendered the 216, we held them merely temporarily until we received the guaranteed bonds.

48. That was the agreement was it? *

A. Yes, sir.

49. Was it understood how long they were to be held? Was there any fixed date?

A. Only long enough to enable them to take them to New York, and secure the guarantee.

50. Did it occur to you as anything out of the way that they were five months in doing that?

A. It did not.

51. You understood, as I understand from your answer, 166 that you were simply giving up these bonds and receiving this temporary pledge just long enough for them to transport the bonds to New York, have them guaranteed and returned?

A. Yes, sir; that is the fact, and the delay that was occasioned never excited the least suspicion in my mind, in fact I had no reason to doubt the right of the Louisville, New Albany & Chicago Railway Co. to indorse the bonds, and in absolute good faith the bonds were procured from us to send forward for that purpose. The delay excited no suspicion. It is not unusual in our business to have matters delayed.

52. That long delay?

A. Frequently longer than that.

I desire to add in this connection that when I gave my former deposition on the 20th day of February, 1893, in case No. 6075, L. N. A. & Chicago Railway Company vs. Ohio Valley Improvement & Contract Company, I was under the impression that the Louisville Trust Company, received the first lot of guaranteed bonds on

January 16th, 1890. In this I was mistaken, the same having been received at a subsequent date, as herein stated, and as set out in the endorsement on the back of the note for \$100,000, bearing date January 16th, 1890, which was a renewal of a note for like amount, bearing date September 13th, 1889, at four months, the collateral on which was the 216 bonds mentioned herein.

The deposition of THEODORE HARRIS, taken on the 4th day of November, 1893, is as follows:

THEODORE HARRIS, being duly sworn and examined by
167 Mr. Miller as attorney for the defendant, deposed as follows:

1. You are one of the defendants in this case?

A. Yes, sir.

2. The Louisville Banking Co., is also a defendant I believe?

A. Yes, sir.

3. You filed your answer in this case some time ago, and also the answer of the Louisville Banking Co., setting up the numbers of the bonds owned by each one of you. I will ask you if those answers correctly state those facts.

A. I believe they do. I don't remember the facts now, but I know when the answer was made the matters were looked into carefully, and I believe the answers were true.

4. That answer shows that you own now twenty of these guaranteed bonds. I will ask you from whom you bought those bonds.

A. I bought them from the Ohio Valley Improvement and Contract Co.

5. Through whom?

A. Judge Richards.

6. Do you remember the time when you bought them?

A. I do not.

7. Was it before or after you were made a party to this suit?

A. Long before. I bought them very soon after the guarantee was placed upon them.

8. You mean the guarantee of the Louisville, New Albany & Chicago railroad?

A. Yes, sir.

9. Was that guarantee upon them at the time you bought them?

A. It was.

10. Upon all of them?

A. Upon all of them.

11. Do you know whether the Louisville, New Albany & Chicago Railroad Co., is a corporation created under the laws of the State of Kentucky?

A. My understanding is that it is chartered by the State of Kentucky.

12. Did you understand that at the time you bought these bonds?

A. I have known that for some time, and I think the charter has been amended perhaps once or twice.

13. Did you know that at the time you bought these bonds?

A. Yes, sir.

14. Do they operate a railroad in Kentucky?

168 A. They do, and at the time they were operating the Louisville Southern railroad at Burgin, and also to Lexington.

15. The complainant in this case alleges and charges certain fraudulent matters between the officers of the New Albany road and the officers of the Ohio Valley Improvement & Contract Co. I will ask you whether you knew anything about any such charges of fraud?

A. I did not.

16. When did you first hear of it?

A. I never heard of it at all. I don't know that I ever heard of it until just now when you mentioned them.

17. Until it was alleged in this case?

A. If I heard of it at any time, I do not remember it, and I do not believe that it is true.

18. Did you know anything about the action of the officers of the Louisville, New Albany & Chicago Railway Co., at the time they put the guarantee upon the bonds you bought?

A. In what respect?

19. About what they did, and how they made this guarantee, and when they made it?

A. No, sir; I didn't know anything about it.

20. Did you have any knowledge or information as to whether there was or was not a quorum of the board of directors present at the time that it was done?

A. I did not.

21. Did you know that it was done either by the board of directors or the stockholders?

A. I didn't know anything about that. I never inquired about the Louisville, New Albany & Chicago bonds that I bought, as to whether they were authorized by the board of directors or the stockholders.

22. Did you know which of them authorized this endorsement?

A. I did not.

23. Did you know anything at the time you bought these bonds about the negotiations that had been pending, or were claimed to have been pending between the plaintiff and the Ohio Valley Company as to the sale and the delivery of these bonds set out in the petition?

A. Well, I knew from hearsay that the New Albany Railway Co. was going to lease, or had leased the Beattyville road, and for a certain consideration in stock of the road, which I think was a majority of the stock, they were to guarantee and did guarantee the bonds.

24. Those were the bonds you bought, some of them?

A. Yes, sir; some of them I bought.

169 25. Were you present at any meeting of the board of directors of the Ohio Valley Company when any of these negotiations were discussed?

A. I think not. I know that I was not.

26. From whom did you get your information?

A. From Judge Richards.

27. He was the person who sold you the bonds?

A. Yes, sir.

28. It is alleged in the petition that at the meeting of the board of directors of the plaintiff held October 8th, 1889, there was not a lawful quorum of directors present. Did you at the time you bought these bonds know anything about that fact?

A. I did not, and do not now.

29. Did you ever personally hold any more than twenty bonds?

A. Not more than that many guaranteed bonds.

30. At the time you bought these bonds for yourself, and at the time you bought the bonds now held by the Louisville Banking Co., did you have any notice of any kind of any defect, or irregularity or fraud in connection with the execution of this endorsement upon them by the plaintiff?

A. I had not.

31. What did you pay for your bonds?

A. I paid ninety cents.

32. That is, \$18,000 for the twenty bonds?

A. Yes, sir.

33. The Louisville Banking Company answers that it held ten of those guaranteed bonds. How did the banking company get possession of these bonds?

A. The banking company got possession by selling them under a lien and becoming the purchaser.

34. They were pledged to the bank for a loan?

A. They were.

35. Was the loan made at the time of the pledge, or at some other time?

A. The loan was made at the time of the pledge.

36. You afterwards enforced your lien and bought the bonds?

A. Yes, sir.

37. It is also alleged in the answer, that the bank holds forty-eight other bonds in pledge. Does the bank still hold those bonds as collateral?

A. No, they are all sold.

38. Your lien on them has been enforced?

A. Yes, sir.

39. The bank is now the owner of them?

170 A. I am asked about forty-eight bonds. I know nothing of any particular forty-eight. Speaking from memory, I believe that the Louisville Banking Company holds ten guaranteed bonds and a great many more that are not guaranteed, and more than forty-eight. I am told that I have made some answer different from this. I do not believe that I did, and if gentlemen have typewritten copies of what purports to be my answer, I do not acknowledge them. I remember that when I was called to give my deposition by Mr. Crawford, I did not know why I was called, until I got into the room. Then Mr. Crawford asked me various

questions, and I answered them as best I could off-hand. He then demanded at the close of the deposition that I should furnish to Mr. Graham, the stenographer, the list of the bonds we held. I did so, and I believe that list is true. Where it is, I do not know.

40. I asked you about your answer you filed to the case for the bank, and in your reply to my question, you seem to refer to your answer in your deposition. Do I understand you to say that the answer filed for the banking company correctly or incorrectly states the number of bonds held by the bank at that time?

A. I presume it correctly states it unless there has been some error in the typewriting or copying.

41. In order to correct any mistake, if it exists, I will ask you to examine the guaranteed bonds held by the bank, and furnish the numbers to the stenographer, and let him incorporate them as your answer to this question?

A. I will do so.

42. Who acted for the bank?

A. I think I did myself, mostly so anyhow.

43. Did you or the banking company have any knowledge or notice of the former deposition of Mr. Loving, and Mr. Wetterer, Cassilly, and the other witnesses that were taken in this case besides yourself?

A. No, sir; I do not know that those gentlemen have ever given depositions in the case.

44. They took yours?

A. They took mine.

Cross-examination by Mr. HELM:

45. Have you any means by which you can fix the date upon which you acquired these several bonds that you have mentioned in this deposition, for either the bank or yourself?

A. Oh, yes, sir; I can give the dates the bank got them. That is to say, our bank made two or three loans to the improvement company, and received in each case bonds as collateral. I could not tell which particular bond or bonds were received with each loan, but I can give the dates of the original loans.

46. And each note either on its face or back shows the number of guaranteed bonds received, does it?

A. No; we never take the numbers of bonds in our pledges. I forbid it.

47. It shows the number of bonds received, and whether they were guaranteed?

A. No, sir; it shows the number of bonds, but we have not got the original notes. They were surrendered long ago, and the notes were renewed. We can only give the dates upon which the loans came in.

48. How would you be able to know then whether they were guaranteed or unguaranteed if you have both?

A. I would not.

49. You would not know whether they were guaranteed or unguaranteed?

A. No, but the loans were all made at some time, long before any controversy arose about them, or at least before I knew of any.

50. Can you tell me whether the loans made by the bank upon which you received those guaranteed bonds were made before or after your individual purchase in January, 1890?

A. Well, I think one or two of them (there were but two large loans), were made about the time, or not far from the time when I bought my twenty bonds, it may have been a little before, or a little after. I think that was a large loan. Then there was another large loan made some time after that, made in the summer of 1890.

51. Upon that large loan, did you receive any of these bonds as collateral?

A. I have already stated that I did not know whether we received the guaranteed bonds on the large loan.

52. The one of the large loans was made about January, 1890, and the other in the summer of 1890?

A. One was made in the summer of 1890, that I am positive of, and the other was made before that time, I don't know just when, but I think about—not far from the time I bought my bonds, which seemed to be January, 1890.

53. You are not able to state upon which of those loans the guaranteed bonds were placed?

A. I am not.

54. Were you present at the meeting of stockholders in New York on March 12th, and on succeeding days in 1890?

A. You mean the stockholders of the Louisville, New Albany & Chicago railway?

172 55. Yes.

A. I was.

56. You participated in the debate on that occasion?

A. Not in their debate.

57. You spoke before the stockholders, I believe?

A. I did.

58. You were then personally cognizant of the position then taken by the New Albany road, or the stockholders of the road?

A. I knew that the road had been overturned—that their management had been overturned, and I wanted to know what they were going to do about the Louisville Southern, of which I was then president. From rumors heard by me, I was afraid that they were going to do some harm to it.

59. You do know however, do you not, that at this stockholders' meeting there was a report showing that this endorsement had been made upon the authority of the board, and that the stockholders by a very large vote repudiated the action of the board?

A. No, I did not know that. If I did know it, I have forgotten it. I was only in the meeting of the stockholders a short time, and that by courtesy, and was there only for the purpose of ascertaining what their intention was with respect to the Louisville Southern railroad. I was invited to speak, and did speak, and as soon as I was through I withdrew, feeling that politeness required it.

60. Was it not a matter of very common report in this city about

that time that the stockholders' meeting did repudiate the action of the board placing the guarantee of the New Albany Company upon these bonds?

A. Well, I cannot say that I have any knowledge of that. I think I remember to have heard so, I don't remember how.

61. Have you not since this deposition was begun had an investigation made with the view of determining whether the banks owns or ever owned the bonds 242 to 243, 138 to 143 inclusive, 117 to 115 inclusive, 238 to 239 inclusive, 258 to 260 inclusive, 240 to 241 inclusive, 225 to 227 inclusive, 203 to 212 inclusive, 155 to 159 inclusive, 118 to 122 inclusive, 29 to 30 inclusive, and 200 to 202 inclusive, alleged in your answer filed in this case to be held by the bank as collateral?

A. As collateral? Now I begin to understand you. I thought you were inquiring about the bonds that we obtained of the Ohio Valley Improvement Co. I do not know what bonds we hold as collateral for other loans made to other people. We may
173 have all these bonds that you speak of. We only have ten bonds that we acquired from the Ohio Valley Improvement Company.

62. You stated as I understood you in a former part of this deposition that these bonds held as collateral had been sold and purchased by the bank, and the bank was now the owner of them?

A. That is true. I had reference to the ten bonds that the bank owns that had been pledged to it by the Ohio Valley Improvement Co., and to no others. The bank very likely holds other bonds belonging to other people as collateral.

63. Will you please obtain and file a statement showing when you received the bonds, the numbers of which have just been given as collateral?

A. You mean the bonds named in your last question?

64. Within the last question or two.

A. I will endeavor to do so.

Redirect examination by Mr. MILLER:

65. As I understand you, the bonds referred to and given in Mr. Helm's question may be held by the bank, pledged to it by persons other than the Ohio Valley Improvement Company?

A. I think very likely.

66. When you gave your answers heretofore, you understood that he asked about bonds that you got from the Ohio Valley Company?

A. That is what I understood.

67. You say you bought your individual bonds about the 2nd day of January, 1890, and that you bought the bonds or received the bonds held by the Louisville Banking Company upon two large loans, one made about January 2nd, 1890, and the other somewhere in the summer of 1890. Have you any way of arriving at the number of those guaranteed bonds that were pledged to you on each one of these loans?

A. No.

68. Do you know what time in the summer of 1890 that second loan was made, as near as you can give it?

A. I think in June.

69. All of these guaranteed bonds from the Ohio Valley Company were received by the bank then upon these two loans?

A. They were, upon one or the other, or both.

70. You have spoken of your presence at a meeting of the stockholders of the New Albany road, and that you spoke before that meeting. Were your remarks and business with the meeting confined to the matters of the Louisville Southern railroad?

174 A. Entirely.

71. Did you have anything to do with, or hear anything said upon that occasion with regard to these bonds, or the action of the board upon these guaranteed bonds, if any was taken?

A. I don't remember to have heard anything.

72. You retired shortly after your business with Louisville Southern matters closed?

A. I had no right in that meeting. I was not a stockholder. I went there to see Dr. Breyfogle, to ask him what he was going to do with the Louisville Southern railroad. He asked me to take a seat, and I did so in the ante-room. Bye and bye, perhaps half an hour, after a while, the meeting was in progress, and he came to me and invited me to come into the meeting, and said he was just about to make a report upon the Louisville Southern railroad, and I was welcome to hear it and make any reply that I chose. I thanked him for the courtesy extended to me, I went in, heard his report, and I made my reply and then retired.

73. Was that your whole connection with the whole matter?

A. That is all.

74. What connection did you have with the Louisville Southern?

A. I was president of it.

75. You had in contemplation the leasing of the Louisville Southern by the New Albany railroad?

A. It was already under lease.

76. And its affairs were before the meeting?

A. I did not know what business they had met for, or what business they had transacted before I went into the room, or what business they transacted after I left the room, but when the business of the Louisville Southern was reached, Dr. Breyfogle came to me and invited me in.

77. In the early part of this deposition you have stated that all the bonds held by the bank as collateral security had been sold, and the bank now owns them. You referred to the ten bonds, or to the forty-eight bonds, or all of the bonds?

A. In that answer, I referred only to the bonds which had been pledged to the bank by the Ohio Valley Improvement & Contract Company.

78. You had no reference to these other forty-eight bonds referred to?

A. I don't know anything about any particular number of forty-

eight. I had no reference to any bonds except the ten bonds
175 that came from the Ohio Valley Improvement Co. I do
know that there are other bonds held by the Louisville
Banking Company in pledge for money loaned to other people, but
thought your question referred only to the Ohio Valley Improve-
ment Company bonds.

79. Did you furnish this list of forty-eight bonds, the numbers of
which are copied in your answer, at the time the answer was pre-
pared?

A. I do not now remember. I suppose that I did.

80. You will verify that statement and see whether it is true or
not?

A. I will.

Recross-examination by Mr. HELM:

81. Will you on the statement which you have promised to file
showing the numbers of the bonds and the date of their reception,
also show the names of the parties whose debts are secured by the
pledge of these bonds?

A. I had rather not do that unless compelled to. I will give my
reason, I have no right to disclose other people's business.

82. Referring back to your answer in which you say you heard
Dr. Breyfogle's report on the Louisville Southern, can you say
whether you heard the whole of his report or not?

A. No, I cannot say whether I heard the whole of it or not. I
heard what I supposed to be the whole of it, though he may have
made some report before, and may have made some report after I
left.

83. He began the reading of his report after you got in, did he?

A. I thought he began the reading of the report about the Louis-
ville Southern after I came in, but whether he had read any other
report before that I don't know. The meeting had been in progress
for some time.

84. When you came in, did he appear to take up his general re-
port and begin at the beginning and read to conclusion or not?

A. I don't remember about that.

The deposition of JAMES G. FETTER is as follows:

JAMES G. FETTER being duly sworn and examined by Mr. Geo.
M. Davie as attorney for the defendant, Kentucky National Bank, de-
posed as follows:

Q. 1. You were president of the Kentucky National Bank were
you not?

A. Yes, sir.

Q. 2. During what year were you president of that bank?

176 A. From about 1885 to the summer of 1893.

Q. 3. Do you recollect the transaction mentioned in the
answer of the Kentucky National bank herein, to wit, a note of W.

W. Jenkins dated January 9th, 1890, and a pledge of \$5,000 of bonds of the R. N. I. & B. Railroad Co.?

A. Yes, sir.

Q. 4. State what was the nature of that transaction.

A. Mr. Jenkins came to the bank to borrow some money on those bonds and as we regarded the bonds as perfectly good at the time they were presented, we made the loan.

Q. 5. What was the nature of these bonds and who were the parties to them?

A. The bonds were executed by the R. N. I. & B. railroad and the interest and principal guaranteed by the Louisville, New Albany and Chicago Railway Co.

Q. 6. I will ask you whether the fact of that guaranty was or was not relied on in making that loan?

A. We regarded the bonds as very much better on account of the endorsement.

Q. 7. On account of the guaranty?

A. Yes; on account of the guaranty of the Louisville, New Albany & Chicago Railway Co.

Q. 8. Did that influence the bank in taking the bonds as collateral?

A. It did.

Q. 9. At the time the bank took those bonds as collateral, I will ask you whether the bank had any knowledge that there was any trouble about the guaranty or any trouble or notice that the guaranty was not authorized?

A. It did not.

Q. 10. What was the bank's knowledge upon that subject and what was its belief and information?

A. Its information and belief was that the guaranty was legitimate and proper.

Q. 11. Did the bank advance this money \$4,300 to Jenkins, lend it to him on this collateral?

A. Yes, sir.

Q. 12. Are you familiar with the transaction, the loan to W. G. Osborne & Co., of \$7,200 on January 11th, 1890, and the pledge of \$8,000 of those bonds?

A. I am.

Q. 13. Please describe that transaction, what its nature was, and what was relied on by the bank in making that loan.

A. A similar reliance to that previous transaction.

177 Q. 14. Was, or not, the bank aware of the fact of the guaranty of the Louisville, New Albany & Chicago Railway Co., on that \$8,000 of bonds at the time they were taken as collateral to that loan?

A. It was.

Q. 15. Did or not the bank rely on that guaranty in making that loan?

A. It did.

Q. 16. Was the money advanced by the bank and loaned thereon?

A. It was.

Q. 17. Do you know of the transaction the loan by the bank to William Cornwall of the sum of \$3,500 on May 3rd, 1890, with \$5,000 of the bonds of the R. N. I. & B. Railroad Co., as collaterals?

A. I do.

Q. 18. I will ask you what was the nature of that loan and whether the guaranty of the Louisville, New Albany and Chicago Railway Co., was relied on by the bank in making that loan?

A. The loan was made in a legitimate way relying upon the collateral and the guaranty of the Louisville, New Albany & Chicago Railway Co.

Q. 19. Was the bank influenced in making this loan and the loan to W. G. Osborne & Co., by the fact that the guaranty of the Louisville, New Albany and Chicago Railway Co., was upon the bonds?

A. It was.

Q. 20. I will ask you whether at the time the bank loaned the money to W. G. Osborne & Co., and at the time it loaned it to William Cornwall above referred to, it had any knowledge or notice that the mortgage was not authorized?

A. It had not.

Q. 21. Was the authority of the Louisville, New Albany and Chicago Railway Co., to make this guaranty questioned in any way?

A. Had the question been made of its authority at the time these loans were made? No, sir.

Q. 22. Did the bank have any other security for these loans except these bonds guaranteed by the Louisville, New Albany and Chicago Railway Co.?

A. I think not. We loaned the money simply on those bonds.

Q. 23. I will ask you whether or not W. W. Jenkins, W. G. Osborne & Co., and William Cornwall are solvent or insolvent and whether this debt can be made out of them?

178 A. I regard them as insolvent.

Q. 24. How much are the bonds of the R. N. I. & B. Railroad Co., and how much can be made out of these bonds without the guaranty of the Louisville, New Albany & Chicago Railway Co., if that guaranty is stricken out?

A. Very little, not over fifteen per cent.

Q. 25. You have stated that the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Co., are worth about fifteen cents on the dollar without this guaranty?

A. Yes, sir.

Q. 26. How much will retaining the guaranty upon the bonds make them worth?

A. I would regard them as worth par.

Q. 27. About par?

A. Yes, sir.

Q. 28. Did or not the bank at the time it took those bonds as collateral have any knowledge that there had been any fraudulent agreement of the officers of the Monon Co., with the Ohio Valley

Improvement and Contract Co., or that the guaranty had not been authorized by any meeting of the directors at which there was present a quorum?

A. It did not.

Q. 29. Did or not the bank at the time it took those bonds as collateral and advance the money have any knowledge that the guaranty on the bonds had not been authorized and approved upon petition or by a vote of a majority of the stockholders of the Louisville, New Albany & Chicago Railway Co.?

A. It had not.

Q. 30. Would the bank have loaned the money on said collateral if it had had any knowledge or notice of any defect in the guaranty of those bonds?

A. It would not.

Cross-examined by Mr. HELM:

Q. 31. What officer of the bank represented the bank in lending that money to Mr. Jenkins?

A. The president.

Q. 32. Yourself?

A. Yes, sir.

Q. 33. What officer of the bank represented the bank in lending the money to Osborne & Co.?

A. The president.

Q. 34. Yourself?

A. Yes, sir.

Q. 35. Did you also lend the money to Cornwall for the bank?

179 A. Yes, sir.

Q. 36. You were a director, I believe, in the Louisville, New Albany & Chicago Railway Co. during the whole of the year in which this guaranty was placed upon the bonds of the R. N. I. & B. Co.?

A. I think I was.

Q. 37. You know perfectly well, do you not, that there was no petition presented to the directors signed by a majority of the stockholders requesting that endorsement?

A. I think not.

Q. 38. You think there was no such petition?

A. No, sir; not that I remember of.

Q. 39. Don't you know there was not in fact any such petition with reference to the money loaned to Cornwall on May 3rd, 1890, that at the time that money was loaned the guaranty had not been questioned and that the bank had no intimation that there was any infirmity or irregularity in the endorsement? Are you not mistaken in that?

A. I had reference to the loan when it was originally made. We had no knowledge of any question of the guaranty at that time.

Q. 41. His question related to May 3rd, 1890?

A. My answer had reference to the original loan.

Q. 42. On May 3rd, 1890, you did know that the matter was questioned?

A. I cannot say that I did.

Q. 43. Don't you know that about a month before that the Louisville, New Albany & Chicago Railway Co. had filed its bill in the circuit court of the United States challenging the validity of that guaranty and that Judge Jackson had granted an injunction against all persons before the court restraining them from parting with the possession in any way of the bonds then in their possession?

A. I remember that there was some such agitation, but I don't remember the time.

Q. 44. You cannot now fix the time?

A. No, sir.

Q. 45. But don't you know to be reasonably sure that at the time that this suit was filed and when there were so many publications about it, you knew of it?

A. Yes, sir.

Q. 46. So that if the suit was filed and this proceeding taken about the 9th or 10th of April, 1890, you must have known on the 3rd of May, 1890, that the validity of the guaranty was questioned?

180 A. I would suppose so, but my point is to state that when the loan was originally made the bank or myself was not in knowledge that there was any question of the guaranty. The loan afterward was reduced and renewed, and owing to the financial condition of Cornwall we were unable to collect it, although it was reduced at each maturity and renewal.

Q. 47. You subscribed for \$100,000 of those bonds yourself?

A. I did.

Q. 48. What became of them?

A. There was never but \$25,000 of them delivered to me, and I disposed of them.

Q. 49. To whom?

A. I really could not say to whom I sold them all.

Q. 50. Tell us as far as you can remember.

A. My recollection is that I sold ten of them to Amos Stickney.

Q. 51. To Major Stickney, of the United States service?

A. Yes, sir; and ten of them to Osborne.

Q. 53. What became of the other five?

A. I don't remember who got them.

Q. 54. Don't you remember any of them?

A. No, sir.

Q. 55. Have you any of them now?

A. I have not.

Q. 56. Does any one hold any bonds for your use or in which you have any interest?

A. No, sir.

Q. 57. Have you any interest with W. G. Osborne & Co. with the bonds held by them?

A. I did have an interest with him but the bank holds them now.

Q. 58. The bank holds them as collateral?

A. I think they have taken them to account.

Q. 59. What do you mean by "taking them to account"? Have they been sold?

A. I don't know that they have been sold; they claim them as their collateral.

Q. 60. They do hold them as collateral, but I would like to know exactly what you mean by the bank "taking them to account." How has the bank acquired any title greater than that acquired when it received the bonds in pledge merely?

A. I presume the bank, aware of the financial condition of Osborne and myself, likely took the bonds to account, deeming that they could not recover from us.

181 Q. 61. Has the bank surrendered the note to Osborne & Co.?

A. It has not that I know of.

Q. 62. You were a banker for a number of years; what right has the bank to hold onto a note and by action of its own invest itself with the ownership of bonds pledged as collateral?

A. The right that we have agreed to surrender everything we had to them for our obligation.

Q. 63. You mean that you sold them the bonds?

A. We have agreed to turn over to them every collateral we had in their hands.

Q. 63½. They did hold them as collaterals; what further turning over did you do?

A. Gave them possession.

Q. 64. They had possession as pledged?

A. Gave them title.

Q. 65. What did you do to give them title?

A. Agreed to surrender them everything they had.

Q. 66. At what price?

A. No specified price was given.

Q. 67. They had those bonds already in pledge and now you have not sold the bonds to them for any sum. have you?

A. No, sir.

Q. 68. You have not received any credit on your note for the bonds, have you?

A. Not that I know of.

Q. 69. Don't it strike you as a somewhat curious transaction that the bank should not be the owner of bonds without crediting you with any part of the consideration therefor on your note or without surrendering your note to you in any way?

A. I presume the bank regards the collateral as the only security they hold and therefore are acting on that.

Q. 70. If that be true why have not they surrendered your notes to you?

A. I do not know.

Q. 71. Have you or Osborne ever demanded the surrender of the notes or that any credit be placed on them?

A. We have not that I know of.

Q. 72. Were you interested in any way in the Jenkins bonds?

A. I was not.

Q. 73. Or in the Cornwall bonds?

A. I was not.

Q. 74. Have you any interest still left in the Stickney bonds?

182 A. I never had any interest in the Stickney bonds.

Q. 75. That was a direct sale?

A. Yes, sir.

Re-examined by Mr. DAVIE:

Q. 76. Please give me the history of each of the notes that have been inquired about?

A. The note of W. W. Jenkins was a demand note dated January 9th, 1890, for \$4,300 on which was pledged \$5,000 of R. N. I. & B. Railroad bonds guaranteed by the Louisville, New Albany & Chicago Railway Co. This pledge was made January 9th, 1890. The note of W. W. Osborne & Co. was a demand note dated January 11th, 1890, for \$7,200 on which was pledged \$8,000 of the R. N. I. & B. bonds with a guaranty of the Louisville, New Albany & Chicago Railway Co. on them. This pledge was made January 11th, 1890. The note of William Cornwall was made May 3rd, 1890, for \$3,500 with a pledge of \$5,000 of bonds of the R. N. I. & B. Railroad Co. guaranteed by the Louisville, New Albany & Chicago Railway Co. This note was renewed on September 6th, for \$3,000 with the same collateral and again on February 11th, 1891, for \$2,250 with the same collateral.

Q. 77. I will ask you whether or not the directors of the Kentucky National bank ratified these loans made by you as president to these parties?

A. They did.

Q. 78. At the time the bank made these loans did the bank directors know that this guarantee had not been petitioned for by a vote of the majority of the stockholders of the Louisville, New Albany & Chicago Railway Co.?

A. They did not.

Q. 79. Did the directors of the bank know at the time these bonds were taken as collateral that the guaranty had not been authorized at a meeting of the directors of the Louisville, New Albany & Chicago Railway Co. at which there was a quorum present?

A. The bank did not know it, in fact there was a quorum of the railroad directors present when it was done.

By Mr. HELM:

Q. 80. Please tell me exactly what affirmative action the directors of your bank took in approving of your course in lending the money in the various transactions which you have detailed in your examination-in-chief?

A. The board of directors of the Kentucky National bank meet Tuesday and at that meeting all loans made for the previous week were read and discussed and approved.

183 Q. 81. Is not this about the fact and is not this about all you want to say in that respect: That it is the custom of that bank at each meeting to read the paper discounted since the last meeting and if any one wishes to criticise or discuss any transaction or any of the paper exhibited they have a right to do so and sometimes do do so, but that where no objection is made the minutes show that the report was approved?

A. It does.

Q. 82. Those are about the facts?

A. Yes, sir.

Q. 83. You have no recollection, have you, of these particular pieces of paper having been actually discussed?

A. I have not.

A. 84. You stated in answer to a question of mine awhile ago that the Cornwall paper originated prior to May 3rd, 1890. I see from this letter from Mr. Bockee, the president, that the loan originated May 3rd, 1890. May you not be mistaken in saying it originated before that time?

A. I may be; I have not the book before me and it was so long ago that I cannot fix the dates.

Q. 85. If then Mr. Bockee, who is now the president of the bank, and has access to the books and who undertaking to give a history of those transactions, states as he appears to in this letter that this Cornwall transaction originated May 3rd, 1890, you would be inclined to believe that you must be mistaken in saying it originated before that?

A. I would think I would be.

By Mr. DAVIE:

Q. 86. I will ask you if the fact of a suit about this guaranty being brought in 1890 was brought before the board of the Kentucky National bank.

A. It was not.

Q. 87. Was the Kentucky National bank a party to any such proceedings in 1890?

A. It was not.

Q. 88. Did the board of the Kentucky National bank in taking this Cornwall paper and at the time it took it know about any question of this guaranty?

A. Not that I know of and I think not.

By Mr. HELM:

Q. 89. Did you not attend the stockholders' meetings March 12th and 22nd, 1890, of the Louisville, New Albany & Chicago Railway Co. in New York?

A. No, sir; I was not there. I did not attend any meetings of the Louisville, New Albany & Chicago Railway Co. since the guaranty of those bonds.

184 Q. 90. Mr. Theodore Harris and Judge Richards and that crowd did attend that meeting?

A. I think so.

Q. 91. And when they came back it was generally reported throughout the community that that endorsement had been repudiated by the L., N. A. & C.?

A. That was generally known.

Q. 92. And when this bill in equity in this very case was filed on April 9th, 1890, and the restraining order granted by Judge Jackson it was published under prominent head-lines in the Courier-Journal and other papers, was it not?

A. Yes, sir.

Q. 93. It was a matter of general discussion in this community?

A. Yes, sir.

United States Circuit Court, Sixth Circuit, District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO RAILROAD COMPANY, Com-
plainant,

vs.

THE OHIO VALLEY IMPROVEMENT & CONTRACT COMPANY, &C.,
Defendants.

To the honorables the judges of the circuit court of the United States for the sixth circuit, district of Kentucky:

The defendant in the above-entitled case, Louisville Banking Company, represents that the court erred to its prejudice in the proceedings and final decree entered therein, which errors are set forth and designated in an assignment of errors, which is filed herewith and made part hereof.

Wherefore, the said defendant prays an appeal to the circuit court of appeals, with supersedeas, and that a proper citation be granted, requiring the complainant, The Louisville, New Albany and Chicago Railroad Company, to appear and show cause to said circuit court of appeals why the decree herein should not be reversed.

BARNETT, MILLER & BARNETT,

Attorneys for Louisville Banking Co.

And on the same day, to wit: on the 11th day of Oct., 1894, came the Louisville Banking Company by counsel and filed its assignment of errors herein, which is as follows:

United States Circuit Court, Sixth Circuit, District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO
RAILROAD COMPANY, Complainant,

vs.

THE OHIO VALLEY IMPROVEMENT AND
CONTRACT COMPANY, &C., Defendants.

Louisville Banking Com-
pany's Assignment of
Errors.

The defendant, The Louisville Banking Company, says that the court in the proceedings and decree rendered in the above-entitled suit, erred to its prejudice as follows:

1. The court erred in adjudging and decreeing that the guaranty

endorsed upon the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, by and in the name of the complainant, was so endorsed without authority.

2. The court erred in holding that the board of directors of complainant had no authority, under the evidence in this case, to make the guaranty of the bonds held by the Ohio Valley Improvement & Contract Company, as it did.

3. The court erred in adjudging and decreeing that the guaranty endorsed on the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Co. in the name of the complainant, is void.

4. The court erred in adjudging, decreeing and directing this defendant to produce the bonds owned by it into court, and in ordering the clerk of the court to cancel the guaranty on the same.

5. The court erred in enjoining and restraining this defendant from selling, alienating or parting with said bonds before said guaranty had been cancelled.

6. The court erred in adjudging and decreeing that complainant, The Louisville, New Albany & Chicago Railroad Company, is not now, and was not when this suit was instituted, a corporation of the State of Kentucky, as well as a corporation of the State of Indiana, and in holding that it is and was at the time this suit was brought, a corporation of the State of Indiana only.

7. The court erred in holding that said guaranty endorsed in the name and under the seal of the corporation, upon bonds owned and held *bona fide* and for a valuable consideration, by this defendant, with no knowledge or information, upon the part of said owner and holder of said bonds of any irregularity, fraud, or illegality in the making of said guaranty, or any want of authority in the complainant's board of directors to execute the same, is nevertheless null and void.

8. The court erred in admitting, over this defendant's objection, the deposition of John A. Hilton, who testified in substance: That the endorsement of guaranty was placed upon the bonds by the authority of the board of directors of complainant and not by the authority of its stockholders, and that complainant repudiated said endorsement at a meeting of its stockholders held March 22, 1890, and after this defendant had bought its bonds for value and without notice of any alleged infirmity in the endorsement.

9. The court erred in adjudging that the complainant recover its costs against this defendant herein.

BARNETT, MILLER & BARNETT,
Att'ys for Louisville Banking Co.

187 United States Circuit Court for the District of Kentucky.

THE LOUISVILLE, NEW ALBANY &
CHICAGO RAILWAY COMPANY

vs.

THE OHIO VALLEY IMPROVEMENT &
CONTRACT COMPANY, &C.

The Petition of the Defendant
The Louisville Trust
Company for an Appeal.

The defendant, The Louisville Trust Company, represents that the court has erred in the proceedings and in the final decree in the above-entitled cause and which errors have been designated and set forth in an assignment of errors which is filed herewith as part hereof.

Wherefore, the defendant prays an appeal to the circuit court of appeals and that a proper citation be granted requiring the Louisville, New Albany and Chicago Railway Company to appear and show cause to the said circuit court of appeals why the decree herein should not be reversed.

ST. JOHN BOYLE, *Attorney.*

The assignment of errors above referred to is as follows, to wit :

United States Circuit Court for the District of Kentucky.

THE LOUISVILLE, NEW ALBANY & CHI-
CAGO RAILROAD COMPANY

vs.

THE OHIO VALLEY IMPROVEMENT &
CONTRACT COMPANY.

Assignment of Errors by
the Louisville Trust
Company.

The Louisville Trust Company complains of errors in the proceedings in the United States court for the district of Kentucky in the suit in equity of The Louisville, New Albany and Chicago Railway Company against The Ohio Valley Improvement and Contract Company and others and assigns the following errors:

1st. The court erred in its decision that the complainant was not a citizen of Kentucky and in maintaining jurisdiction of the said cause.

2nd. The court erred in overruling the demurrer of the defendant to the original and supplemental bills of complaint and in its decision that the case was one of which a court of equity had jurisdiction.

3rd. The court erred in deciding that the complainant had no legal authority to endorse the guaranty on the bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Company.

4th. The court erred in deciding that the complainants were entitled as against the said defendant to have its guaranty endorsed on such bonds cancelled.

5th. The court erred in deciding that the complainant was not a corporation of the State of Kentucky and was not authorized to make such guarantee.

ST. JOHN BOYLE, *Attorney.*

188 On the 30th day of November, 1894, came the Louisville Banking Company by its attorney and on its motion it is ordered that an appeal be granted it herein.

Came again the Louisville Banking Company and filed its appeal bond in the penalty of one thousand dollars (\$1,000.00) conditioned according to law, with Theodore Harris as surety, which bond is now approved.

The bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY CO. }
vs.
 OHIO VALLEY IMPROVEMENT AND CONTRACT CO. *et al.* }

Know all men by these presents that we, the Louisville Banking Company, principal, and Theodore Harris, are held and firmly bound unto the Louisville, New Albany and Chicago Railway Co., in the sum of one thousand dollars, to be paid to the said Louisville, New Albany and Chicago Railway Company, executors and administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 13th day of October, A. D. 1894.

Whereas, the above-named Louisville Banking Company hath prosecuted an appeal to the United States circuit court of appeals for the sixth circuit to reverse the decree rendered in the above-entitled suit, by the circuit court of the United States for the district of Kentucky, at Louisville.

Now, therefore, the condition of this obligation is such, that if the above-named Louisville Banking Company shall prosecute its said appeal to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[L. S.]
 [L. S.]
 [L. S.]

LOUISVILLE BANKING CO.,
 By THEODORE HARRIS, *Pt.*
 THEODORE HARRIS.

Sealed and delivered in the presence of—

HENRY F. CASSIN,

Deputy Clerk U. S. Courts.

Approved:

JNO. W. BARR.

189 On the 30th day of November, 1894, came the Louisville Trust Company by its attorney, and on its motion it is ordered that an appeal be allowed it herein.

Came again the Louisville Trust Company and filed its appeal bond herein in the penalty of twelve thousand five hundred dollars

(12,500.00) conditioned according to law, with St. John Boyle as surety, which bond is now approved.

The bond above referred to is as follows :

Circuit Court of the United States, District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY CO. }
 vs.
 OHIO VALLEY IMPROVEMENT AND CONTRACT CO. *et al.* }

Know all men by these presents that we, The Louisville Trust Company, principal, and St. John Boyle, are held and firmly bound unto The Louisville, New Albany and Chicago Railway Company in the sum of twelve thousand five hundred dollars, to be paid to the said Louisville, New Albany and Chicago Railway Company, executors and administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 22nd day of October, A. D. 1894.

Whereas, the above-named Louisville Trust Company hath prosecuted an appeal to the United States circuit court of appeals for the sixth circuit to reverse the decree rendered in the above-entitled suit, by the circuit court of the United States for the district of Kentucky, at Louisville :

Now, therefore, the condition of this obligation is such, that if the above-named Louisville Trust Company shall prosecute its said appeal to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void ; otherwise the same shall be and remain in full force and virtue.

[L. S.]
 [L. S.]
 [L. S.]

LOUISVILLE TRUST CO.,
 By ST. JOHN BOYLE, *Att'y.*
 ST. JOHN BOYLE.

Sealed and delivered in presence of—

HENRY F. CASSIN,

Deputy Clerk U. S. Courts.

Approved :

JNO. W. BARR.

190

UNITED STATES OF AMERICA, }
District of Kentucky, Sixth Judicial Circuit, }^{ss} :

To the Louisville, New Albany & Chicago Railway Company,
 Greeting :

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the 30th day of December next, pursuant to an appeal granted by the circuit court of the United States for the district of Kentucky, wherein The Louisville Trust Co. is appellant and you are appellee,

to show cause, if any there be, why the decree rendered as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 30th day of November, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States of America the one hundred and nineteenth.

JNO. W. BARR, *Judge.*

The Louisville, New Albany and Chicago Railway Company accepts services of the within citation.

G. W. KRETZINGER, *Counsel,*
By JAMES S. PIRTLE.

Filed December 29, 1894.

FRANK O. LOVELAND, *Clerk.*

191 UNITED STATES OF AMERICA, {
District of Kentucky, Sixth Judicial Circuit, } ss:

To the Louisville, New Albany and Chicago Railway Company,
Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the 30th day of December next, pursuant to an appeal, granted by the circuit court of the United States for the district of Kentucky, wherein Louisville Banking Co. is appellant and you are appellee, to show cause, if any there be, why the decree rendered as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 30th day of November, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States of America the one hundred and nineteenth.

JNO. W. BARR, *Judge.*

The Louisville, New Albany and Chicago Railway Company accepts service of the within citation.

G. W. KRETZINGER, *Counsel,*
By JAMES S. PIRTLE.

Filed Dec. 29, 1894.

FRANK O. LOVELAND, *Clerk.*

192-194 And afterwards, to wit, on May 14, 1895, an order of continuance was entered upon the journal of said court in said cause; which order is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE TRUST COMPANY, Appellant,	}	Nos. 277 to 295. Appeal from the Circuit Court of the United States for the District of Kentucky, at Louisville.
<i>vs.</i>		
LOUISVILLE, NEW ALBANY & CHICAGO R. R. Co. and Cases to be Heard on Same Record, Nos. 277 to 295, Inclusive, Appellees.	}	

This cause is continued until the next term.

And afterwards, to wit, on June 5, 1895, the following entry was spread upon the journal of said court in said cause; which entry is in the following words and figures, to wit:

195 United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE TRUST COMPANY, Appellant,	}	Nos. 227 to 295. Appeal from the Circuit Court of the United States for the District of Kentucky, at Louisville.
<i>vs.</i>		
LOUISVILLE, NEW ALBANY & CHICAGO R. R. Co. and Cases to be Heard on Same Record, Nos. 277 to 295, Inclusive, Appellees.	}	

These causes came on to be argued this day and were argued in part by Mr. Alexander Humphrey for appellants, and Mr. James S. Pirtle, for appellees, and the hearing of these causes was continued until tomorrow morning at 9.30 o'clock.

And afterwards, to wit, on June 6, 1895, an entry was made upon the journal of said court in said cause, which reads and is as follows:

Court met pursuant to adjournment.

Present: Hon. Wm. H. Taft and Hon. Horace H. Lurton, circuit judges, and Hon. Henry F. Severens, district judge.

LOUISVILLE TRUST COMPANY, Appellant,	}	Appeal from the Circuit Court of the United States for the District of Kentucky, at Louisville.
<i>vs.</i>		
LOUISVILLE, NEW ALBANY & CHICAGO R. R. Co. and Cases to be Heard on Same Record, Nos. 277 to 295, Inclusive, Appellees.	}	

These causes came on to be heard this day for further argument and were argued by Mr. James S. Pirtle and Mr. G. W. Kretzinger, for the appellees, and Mr. St. John Boyle and Mr. L. H. Noble, for the appellants, and the causes were then submitted to the court.

196 And afterwards, to wit, on June 14, 1895, a stipulation was filed in said court in said cause, which reads and is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE TRUST COMPANY, Appellant,	} Nos. 277 to 295. Appeal
<i>vs.</i>	
LOUISVILLE, NEW ALBANY & CHICAGO R.	} from the Circuit Court
R. Co. and Cases to be Heard on Same	
Record, Nos. 277 to 295, Inclusive, Appellees.	
	} of the United States
	} for the District of
	} Kentucky, at Louis-
	} ville.

It is agreed that the appellees may have until June 22nd to file responsive brief in these causes.

And afterwards, to wit, on June 22nd, 1896, the following opinion was filed in said court in said cause, which reads and is as follows:

Opinion.

197 United States Circuit Court of Appeals, Sixth Circuit

Nos. 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289,
290, 291, 292, 293, 294, 295 (nineteen cases).

LOUISVILLE TRUST Co. <i>et al.</i> , Appel-	} Appeals from the Circuit
lants,	
<i>vs.</i>	} Court of the United States
LOUISVILLE, NEW ALBANY & CHICAGO	
R. R. Co., Appellee.	
	} for the District of Ken-
	} tucky, at Louisville.

Before Taft, circuit judge, and Severeus and Hammond, district judges.

Submitted June 6, 1895.

Decided June 22, 1896.

These are nineteen appeals from the same decree.

The bill was filed by The Louisville, New Albany & Chicago Railroad Company (hereafter called the New Albany Company), as a corporation of Indiana, against the Ohio Valley Improvement and Contract Company (hereafter called the improvement company), a Kentucky corporation, and numerous other defendants, citizens of Kentucky, to obtain the cancellation of that which purported to be a guaranty of the New Albany Company indorsed upon bonds held by the defendants and issued by the Richmond, Irvine, Nicholasville and Beattyville Railroad Company (hereafter called the Beattyville Company), and to enjoin suits thereon.

The bill averred that the pretended guaranty had been fraudulently placed upon the Beattyville Company's bonds by a minority of the complainant's directors, who, as individuals, had secured the option to buy the bonds at a low price; that the guaranty was void because authorized by a pretended meeting of the directors at which there was no quorum; that by the law of Indiana no valid guaranty could be made by the complainant unless a majority of its stockholders filed a written petition for the same with the board of

directors, that no such petition had been filed, and that for this reason also, the pretended guaranty was null and void.

The answer of the improvement company and the other defendants raised the question of jurisdiction by denying that the complainant was a corporation and citizen of Indiana, and averring that it was a corporation of Kentucky, and thus a citizen of the same State as many of the defendants. It averred that the guaranty was within the power of the board of directors of the New Albany Company and that it was for a good and valuable consideration, and denied all the charges of fraud against the directors contained in the bill.

The question of jurisdiction was heard before Mr. Justice Brewer and Mr. Justice (then Judge) Jackson, and the jurisdiction of the court was sustained. A demurrer to the bill on the ground that it did not state any ground for equitable relief was overruled by Judge

Lurton. Subsequently some of the defendants, among whom 198 was the improvement company, came in and consented that the guaranty on their bonds might be canceled. By supplemental bills, other holders of bonds were made defendants. In addition to other defenses set up in their answers many of the defendants averred that they were *bona fide* purchasers for value of the bonds without notice of any defects in the guaranty. The issues thus raised were heard before Judge Barr, and he decided them all in favor of the complainant and entered a decree directing a cancellation of all the guaranties, and enjoining defendants from prosecuting suits thereon. Nineteen of the defendants who claimed as *bona fide* purchasers took the present appeals. The following list shows the appellants and the number of bonds held by each.

Bonds for \$1,000 Each.

The Louisville Trust Company.....	125
The Kentucky National bank.....	18
The Louisville Banking Company.....	55
Theodore Harris.....	20
John H. Leathers.....	15
B. Hollman.....	10
A. J. Ross.....	10
W. C. Nones.....	5
James A. Shuttleworth.....	10
W. H. Dillingham.....	6
A. Schwabacher.....	5
R. L. Whitney.....	5
Ronald Whitney.....	5
Wm. M. Charlton.....	5
S. A. Cannon.....	4
M. A. Huston.....	3
John T. Bate, Jr.....	2
Burton A. Duerson.....	2
Ben. C. Weaver.....	2

In order to make clear the questions of jurisdiction and corporate authority here to be considered, it is necessary to set out in some detail the history of the New Albany corporation and the legislation in Indiana and Kentucky affecting them, together with circumstances under which the guaranty was indorsed on the bonds.

The Louisville, New Albany & Chicago Railroad Company was organized in 1873 as a railroad corporation of the State of Indiana, under the act of the legislature of that State, passed March 3, 1865. That act provided among other things that "any railroad company incorporated under the provisions of this act shall have the power and authority to acquire by purchase or contract, the road, road-bed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect the line of such railroad company or any part of the same, or the use or enjoyment thereof, in whole or in part; may also purchase or contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining States, and may assume such of the debts and liabilities of such corporation as may be deemed proper." (Revised Statutes of Indiana, section 3951.)

The statutes of Indiana applicable to the company also 199 provided that every such railroad corporation should "have capacity to hold, enjoy and exercise within other States, the aforesaid faculties, powers, rights, franchises and immunities, and such others as may be conferred upon it by any law of this State or of any other State in which any portion of its railroad may be situate or in which it may transact any part of its business." (Revised Statutes of Indiana, 3949.)

On April 8, 1880, the legislature of Kentucky passed an act entitled "An act to incorporate the Louisville, New Albany & Chicago Railway Company."

It was as follows:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. That the Louisville, New Albany & Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations, and authority to operate a railroad.

"2. That the Louisville, New Albany & Chicago Railway Company is hereby authorized to purchase or lease for depot purposes, in the city of Louisville or county of Jefferson, such real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machine shops, and for all switches or turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used, or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same, and for all such purposes shall have the right to condemn all property required for the carrying out of the objects herein named, and may bond the

same, and secure the payment of any such bonds by a mortgage of its property, rights and franchises.

"3. That said corporation shall have the power and right to condemn all property in the city of Louisville or county of Jefferson, in this State, which may be deemed by it to be necessary for the purposes set out in this act; and that the proceedings for that purpose shall be instituted either in the Jefferson court of common pleas or the Louisville chancery court, and shall be carried on, as nearly as may be, as actions at law by ordinary proceedings. Warning orders against non-residents, absent defendants, or unknown owners of property must be published three times in one of the daily newspapers published in said city of Louisville, State of Kentucky, the last publication at least ten days before the trial. The owners of distinct parcels of one contiguous tract may all be included in one proceeding, or any one or more of them holding contiguous tracts may be proceeded against in a separate action. The courts shall make all such rules, orders, and judgments as will secure a fair trial by an impartial jury of said city or county, and shall give proceedings upon its docket as soon as the parties are before the court and the issue made up. The jurors shall be sworn truly to ascertain and determine by their verdict the amount of compensation each owner will be entitled to if his land or property described in the petition be condemned. The court in which these proceedings are brought shall have power to assign a day for the trial of the case as soon as the petition is filed. Upon the return of the verdict, the court shall render judgment vesting title to the property described in the proceedings in said corporation, said judgment to take effect upon the payment into court by said corporation of the amount of money named in the verdict, within thirty days after the rendition of said judgment; and should said corporation fail to pay said money within said time, the said proceedings shall be dismissed without prejudice to other and subsequent proceedings.

200 "4. This act shall take effect from and after its passage.

"Approved April 8, 1880."

On May 5, 1881, the Louisville, New Albany & Chicago Railroad Company of Indiana, and the Chicago, Indianapolis & Air Line Railway Company, a corporation of the State of Illinois, under and by virtue of the laws of the States of Illinois and Indiana, consolidated their stock and their property. In the third article of the consolidation it was provided, among other things, as follows:

"Article 3. The said consolidated corporation hereby created shall be vested with all the rights, privileges, immunities and franchises which usually pertain to railroad corporations under the laws of the respective States of Illinois and Indiana, wherein the lines of its railroad are situate, and shall also be vested with all and singular the rights, powers, privileges, immunities, capacities and franchises which before the execution of these articles *was* lawfully possessed or exercised by either of the parties hereto."

This article was in accordance with the statutes of Indiana permitting such consolidation.

By article 9 it was provided that the principal place of business and general office of the consolidated corporation should be established in the city of Louisville, Kentucky.

Upon April 7, 1882, subsequent to the consolidation, the Kentucky legislature passed an act entitled "An act to amend an act, entitled 'An act to incorporate the Louisville, New Albany & Chicago Railway Company, approved April 8, 1880: '"

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. That the Louisville, New Albany & Chicago Railway Company is hereby authorized and empowered to indorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the State of Kentucky, and may consolidate its rights, franchises and privileges with any railway company authorized to construct a railroad from the city of Louisville to any point on the Virginia line, such indorsement, guarantee, or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the State of Kentucky: Provided, it shall not lease or consolidate with any two lines of railway parallel to each other; or it may make such traffic arrangement or agreement with any such aforementioned road as its board of directors may deem proper.

"2. This act shall take effect from and after its passage.

"Approved April 7, 1882."

In 1883, the legislature of Indiana enacted an amendment to the statutes governing railroad corporations of that State, which has since appeared as sections 3951a, 3951b and 3951c of the Revised Statutes as follows:

"3951a. Guaranty of bonds of another company.—The board of directors of any railway company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the State in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining State, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

201 "3951b. Petition of stockholders.—2. The petition of the stockholders specified in the preceding section of this act shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

"3951c. Limitation of the power.—3. No railway company shall under the provisions of this act, indorse or guarantee the bonds of any such railway company or companies as is above mentioned to an amount exceeding one-half of the par value of the stock of the railway company so indorsing or guaranteeing, as authorized under this act."

In 1888, the New Albany Company, as a corporation of Indiana and Kentucky, by a vote of their stockholders and directors, leased the Louisville Southern railroad, running from Louisville to Burgin on the Cincinnati Southern railroad. The Beattyville road connecting as it did with a branch of the Louisville Southern would, if completed, have extended the connections of the New Albany Company a very considerable distance on the way to the Virginia line. Pending this lease, and on October 9, 1889, the board of directors of the New Albany Company passed a resolution ordering the execution of a contract with the Ohio Valley Improvement and Contract Company, the principal contractor for the building of the Beattyville railroad, by which the New Albany Company, as a corporation of Kentucky and Indiana, agreed to guarantee the first-mortgage bonds of the Beattyville Company to the extent of \$25,000 per mile of constructed road, as they should be delivered to the improvement company in performance of the contract of construction, in consideration of the delivery by the improvement company to the New Albany Company of three-fourths of the stock of the Beattyville Company, \$3,000 at par of the stock being delivered for each \$4,000 of bonds guaranteed. The language of the contract, which was spread upon the minutes of the board, began thus:

"This agreement, made between the Ohio Valley Improvement & Contract Company, a corporation organized and existing under the laws of the State of Kentucky, party of the first part, and the Louisville, New Albany & Chicago Railway Company, a corporation organized and existing under the laws of the States of Indiana and Kentucky, and hereinafter called the New Albany Company, party of the second part, witnesseth, etc."

The fourth clause of the contract was as follows:

"Fourth. The said New Albany Company agrees to and with the said construction company that it will, from time to time, as the said first-mortgage bonds are earned by and delivered to the said construction company pursuant to terms of their said construction contract, guarantee the payment by the said Beattyville Company of the principal and interest of the said bonds in manner and form following, that is to say, by indorsing upon each of said bonds a contract of guaranty as follows:

"For value received the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond the payment by the obligor thereon, of the principal and interest thereof in accordance with the tenor thereof.

"In witness whereof the said railway company has caused its corporate name to be signed hereto by its president and its seal to be attached by its secretary."

The testatum clause of the contract was as follows:

"In witness whereof the parties hereto have caused their

202 corporate names to be subscribed by their respective presidents and their corporate seals to be attached by their secretaries.

(Signed)

OHIO VALLEY IMPROVEMENT &
CONSTRUCTION CO.,
By A. E. RICHARDS, *President*.

Attest:

[SEAL.] WM. CORNWALL, JR., *Secretary*.

LOUISVILLE, NEW ALBANY &
CHICAGO RAILWAY CO.,
By WM. DOWD, *President*.

Attest:

[SEAL.] JOHN A. HILTON,
Assistant Secretary."

The contract was complied with by both parties until the change in the management of the New Albany hereafter described. The stock was delivered to the New Albany Company, and the following guaranty was indorsed on each of 1,185 bonds of \$1,000 each under the corporate seal of the company.

"For value received the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond the payment by the obligor thereon of the principal and interest thereof in accordance with the tenor thereof. In witness whereof the said railway company has caused its corporate name to be signed hereto by its president and its seal to be attached by its secretary.

Attest:

[SEAL.] JOHN A. HILTON,
Assistant Secretary.

LOUISVILLE, NEW ALBANY & CHI-
CAGO RAILWAY CO.,
By WM. DOWD, *President.*"

The bonds thus guaranteed were placed on the market by the improvement company, and many of them were sold before March, 1890. In that month the annual meeting of the stockholders of the New Albany Company was held, the old directors were ousted and new ones elected. The contract of guaranty on those bonds was at once repudiated by the new board as *ultra vires* and fraudulent, and the improvement company notified. This bill was soon after filed.

There was no evidence whatever introduced by complainant to sustain the averments of fraud against the old directors, and it is manifest that they were in good faith convinced that the guaranty would secure to the New Albany road a valuable connection, and made the contract from that motive alone.

The evidence also failed to establish that the meeting of the directors, at which the contract of guaranty was approved and ordered to be executed, was not in every respect a lawful meeting of the directors. A stipulation was entered into by the parties,

which in effect eliminated from the cases all question as to the regularity of the directors' meeting.

It was conceded by nearly all the appellants here that no petition for the guaranty was filed with the board by a majority of the stockholders, and the evidence shows this beyond controversy. It appeared clearly that all the appellants were *bona fide* purchasers for value without notice of any defect, except the Kentucky National bank and the Louisville Banking Company. The facts concerning their knowledge are stated in the opinion.

The bill of complainant tendered back to the improvement company the stock received by the New Albany Company, and it was deposited in the office of the clerk. The Beattyville Company and the improvement company went on with the work of construction in the spring and summer of 1890, but were soon compelled
203 to suspend it, and both became insolvent and passed into the hands of receivers.

TAFT, circuit judge, after stating the facts as above, delivered the opinion of the court:

The first question made by the appellants is one of jurisdiction. It is contended that the complainant below is a corporation and citizen of Kentucky and therefore that this is an action between citizens of the same State. It is said that the acts of the Kentucky legislature quoted above made the complainant a Kentucky corporation, and that when it sues in Kentucky it must be treated as a citizen thereof. To this, counsel for the complainant respond that the acts of Kentucky relied on did not create a new corporation, but were a mere license to the Indiana corporation to do business in Kentucky. In our view of the case it is not necessary, in considering the question of jurisdiction to decide whether the Kentucky acts created a new corporation or not. If they did create a new corporation it was not the new corporation which was bringing the suit below. That was the corporation of Indiana, a citizen of Indiana, and not a citizen of Kentucky. Under the decision of the Supreme Court of the United States in *The Nashua Railroad against The Lowell Railroad*, 136 U. S. 356, it is clear that in order to protect the rights accruing to the Indiana corporation as distinguished from those belonging to its Kentucky counterpart, the Indiana corporation might bring suit in a Federal court in Kentucky as a citizen of Indiana. This is also in accordance with the decision of the court of appeals of Kentucky in *The Newport & Cincinnati Bridge Company v. R. H. Woolley*, 78 Ky. 523. In that case it appeared that there were two companies, one organized under the laws of Ohio and the other under the laws of Kentucky as the Newport and Cincinnati Bridge Company, having the same incorporators. The suit was brought against the Ohio corporation as a non-resident in a State court of Kentucky by one claiming compensation for services rendered to it, and it was held that the Ohio corporation might be sued in Kentucky as a non-resident, although there was present in Kentucky as its general agent a Kentucky corporation of the same name and same management, and owning the same bridge.

But even if the Kentucky acts did create a new corporation out of the Louisville, New Albany & Chicago Railway Company in 1880, the new corporation, though created by Kentucky law, was, for purposes of Federal jurisdiction, a citizen of Indiana. This follows from the decision of the Supreme Court of the United States in the case of *The St. Louis & San Francisco R'y Co. v. Etta James*, 161 U. S. 545. The St. Louis & San Francisco R'y Company was a corporation organized under the laws of Missouri. It owned and operated a railway in Arkansas. By virtue of the laws of the latter State it was required to file a copy of its charter and a certificate of its corporation with the secretary of state. It was declared to become thereby a domestic corporation of the State of Arkansas.

The action was for a personal injury inflicted in Missouri. The plaintiff was a citizen of Missouri and sued the corporation in the Federal court in Arkansas as a corporation of Arkansas. The Supreme Court decided that the indisputable presumption that the incorporators of the company were citizens of the State granting incorporation applied only when the incorporators were individuals, and that when the act of incorporation purported to create a new corporation out of the corporation of another State, the new corporation, for purposes of Federal jurisdiction, must be regarded as a citizen of the same State as that of the constituent corporation. It was therefore held that though the St. Louis & San Francisco Railway Company might be a corporation of Arkansas by virtue of the statute making it such, nevertheless, because the law professed to make the new corporation out of a corporation of Missouri, the citizenship of the new corporation must be the same as that of the old, and there was consequently no jurisdiction. So in the case at bar, as the Kentucky acts professed to incorporate a corporation of Indiana, there is no presumption that the corporators are citizens of Kentucky which will make, for purposes of Federal jurisdiction, the new Kentucky corporation a citizen of that State. It follows that whether the complainant in the bill below must be regarded as a corporation of Indiana or a corporation created by the acts of the Kentucky legislature already referred to, in either case it was a citizen of Indiana for the purposes of Federal jurisdiction. The cause was therefore one arising between citizens of different States, and the court below had full jurisdiction.

We come now to the question whether the company which appears to have entered into the contract of guaranty had the corporate power to do so. The contract purports to have been made by the New Albany Company as a corporation both of Indiana and Kentucky. We shall first inquire, therefore, whether there was a Kentucky corporation and whether it had the necessary corporate authority. We cannot escape the conclusion that it was the intention of the Kentucky legislature, fitly expressed by the act of April 7, 1880, to make that which was an Indiana corporation a corporation of the State of Kentucky. The act is entitled "An act to incorporate the Louisville, New Albany & Chicago Railway Company." It is true that the title of the act is not controlling in reaching the intention of the legislature. (*Goodlett v. Louisville &*

Nashville Railroad, 122 U. S., 391.) But when the title of the act corresponds with the expressly declared intention of the act, it may be referred to as enforcing that intention. The first section of the act provides :

"That the Louisville, New Albany & Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations, and authority to operate a railroad."

It would be difficult to express in concise language any more clearly than is here done the intention of the legislature to create a new corporation. By the second section of the act the corporation thus created, is authorized to purchase or lease, for depot purposes, in the city of Louisville or county of Jefferson, all necessary real estate ; is authorized to connect with any railroad or branch in said county of Jefferson, and to build connecting lines, or to lease or operate the same, and to condemn real estate required to carry out the objects named in the act, to issue bonds, and to secure the payment of such bonds by a mortgage on its corporate rights and franchises. By the third section of the act a form of procedure is

205 prescribed by which the condemnation proceedings may be carried on, and courts are named which shall have jurisdiction of the same. It may be too much to say that these are powers never conferred by the legislature of one State upon the corporation of another, but it is certainly true that they are powers more naturally and generally conferred by a State upon a body of its creation. The franchises and corporate rights to be mortgaged could hardly be construed to be the franchises conferred by Indiana, because those are usually regarded as wholly under the legislative control of the government which granted them. It is true that there is no provision in the incorporating act for stock, and there are many provisions frequently made in the organization of new companies, by incorporating individual incorporators, which are here omitted ; and if it is not in the power of a State to incorporate the corporation of another State by adoption, so to speak, then this act might very well be construed only to effect a license to the Indiana corporation to do the business and exercise the powers in the act named, in the State of Kentucky, so far as they may be consistent with its powers and limitations of power in its Indiana charter. Under such a construction the first section of the act, in so far as it attempts to create a Kentucky corporation, would have to be regarded as merely nugatory. But it is not true that one State may not incorporate a corporation of another State as such. It may be done, too, without any specific provisions for the stock or internal government of the new corporation. This is expressly settled by several decisions of the Supreme Court of the United States.

Railroad v. Harris, 12 Wall., 65.

Railroad v. Vance, 96 U. S., 450.

Clark v. Bernard, 108 U. S., 436.

Graham v. Hartford R. R., 118 U. S., 161.

In a case of the same character, decided in this court, *The Western & Atlantic R. R. Co. v. Roberson*, 22 U. S. App. 187, the same result was reached. In that case Judge Lurton, who delivered the opinion of the court, after referring to the case of *Railroad Co. v. Vance*, *supra*, and its effect said :

"Comment was made in that case, as in this, that the new corporation as such had no shareholders and no formal organization. A corporation is after all nothing more or less than a fiction of the law. We see no reason why the ordinary constituency of a corporation, such as shareholders, directors and officers, may not be dispensed with by a legislature untrammelled by constitutional restrictions by the substitution of another entity, fictitious though it may be, as the necessary constituency of the new corporation. The shareholders in the old corporation become, for the purpose of the new creation, shareholders in the new. The directors and officers of the old entity become for the formal purposes of the new creation and its operation, the directors and officers of the new organization. This identity of ultimate constituency does not necessarily operate to defeat the legislative purpose to make a new corporation. The old organization *quoad hoc* is the new corporation. Yet for the purposes of the new, as to its contracts, obligations, liabilities and property, there is no such blending of the two as to make them in contemplation of law identical."

In the light of these authorities it is impossible to conclude that the act of Kentucky of 1880 was a mere license act.

206 The effect of the consolidation of the Indiana Company with an Illinois corporation in 1881 has been made the subject of a very extended discussion in the briefs of counsel for the appellee. On it they base a contention that the Kentucky corporation ceased to exercise its franchises thereafter because the property in Kentucky became the property of the consolidated Indiana and Illinois corporation which was not and could not be the constituent of the Kentucky corporation. We do not perceive that this consolidation creates any difficulty. The Kentucky corporation having been once established could not die except by its own act or that of the State which gave it being. Everything it had acquired in the way of property remained in it after the consolidation of its constituent with the Illinois corporation. It was not and could not be ousted of its franchise thereby. The Kentucky corporation when incorporated, was intended by the legislature of Kentucky to be under the same organization and the management as the Indiana company. When the incorporators of the Indiana company added others to their number by virtue of the laws of Indiana, and to this extent changed the management, the franchises which the incorporators had obtained by the incorporation of the old company in Kentucky were simply transferred by express provision of the articles of consolidation to the new organization. If it were necessary to have such a transfer approved by the Kentucky legislature, we have it recognized and approved in the act of April 7, 1882, in recognizing and adding to the powers of the Kentucky corporation, which was then being managed by the consolidated

corporation of Indiana and Illinois. The possibility of implied recognition and acquiescence in the effect of a consolidation by subsequent legislation is very clearly shown in the case of *McAuley v. C. C. & I. R. Co.*, 83 Ill. 348, and in *Mead v. N. Y. H. & N. R. Co.*, 45 Conn. 199. Analogous instances of legislative recognition and acquiescence in corporate consolidation are found in *United States v. The Southern Pacific Railroad Company*, 45 Fed. Rep. 596; *Railroad Co. v. Pool*, 32 Fed. Rep. 451. It is urged that, by the consolidation, the entity of the Indiana corporation which had been adopted as the constituent of the Kentucky corporation, ceased to be, and a new being appeared, a wholly different individual, in the shape of the consolidated corporation. It is clear from the Indiana statute of consolidation and the decisions of that State construing their effect, that whether the old constituent survives in the new consolidated corporation or dies, the new corporation has all the attributes of the old.

L. N. A. & C. R. Co. v. Bonnie, 117 Indiana, 501-504.

If one of these attributes was that of being the constituent of a Kentucky corporation, there was no reason why the new corporation should not continue to enjoy that relation provided objection was not made by the Kentucky legislature. Instead of objecting, the legislature, as we have seen, affirmatively approved the new condition brought about by the consolidation by the act of 1882.

It is said that there is no evidence that either the old Indiana company or the consolidated corporation of Indiana and Illinois ever accepted the charter conferred by the act of 1880, or the amendment thereto of 1882. There was no specific provision in either of the acts that their benefits should be accepted by the railroad company in any formal way. In such a case it is probable that acceptance would be presumed and that the act would be operative without any act of the company.

Zabriskie v. Cleveland, etc., R. R., 23 How. 381, 396.

But if acceptance is necessary, it will settled that it may be shown by acts *in pais*.

Zabriskie v. Cleveland, etc., R. R. Co., 23 How. 381.

Russell v. McLellan, 14 Pick. 63.

McKay v. Beard, 20 S. C. 156.

Hammond v. Strauss, 53 Md. 1.

1 Thompson on Corporations, sec. 63.

The record shows that in 1881, before the consolidation, the Louisville, New Albany & Chicago Railroad Company, acting avowedly as a corporation of Kentucky, took deeds to itself of land in Jefferson county and had the same recorded. The evidences of action by the consolidated corporation of Indiana and Illinois under and by virtue of the Kentucky charter are ample. Upon March 24, 1884, there was recorded in Jefferson county, Kentucky, the mortgage of the Louisville, New Albany & Chicago Railroad Company to the Farmers' Loan and Trust Company, in which the mortgagor was recited therein to be a corporation duly created and existing

under the laws of the State of Indiana and State of Kentucky. The mortgage conveyed the railway and other property in Indiana and in Kentucky. In January, 1886, there was executed a similar mortgage with the same recital which covered the terminals in the city of Louisville and the railroad between the city of Louisville and the city of New Albany, and the railway of the corporation lying in Jefferson county, Ky. In February, 1887, the Louisville, New Albany & Chicago Railway Company, reciting that it was a corporation of Kentucky and that it was duly empowered as such by its charter passed by the General Assembly of the Commonwealth of Kentucky to condemn lands, filed its petition in the Jefferson county court to obtain condemnation of certain land in Jefferson county, procured a decree, paid the money and took possession of the land. Two petitions for removal to the Federal court were filed by the company as a Kentucky corporation in Indiana on the ground that it was not a resident of Indiana. In 1886, the stockholders and directors of the Louisville, New Albany & Chicago Railway Company, reciting it to be a corporation of Indiana and a corporation of Kentucky, became the lessee of the Louisville Southern road, extending from Louisville to Burgin. The road was operated under this lease for the period of nearly two years. From this evidence we have not the slightest doubt that both acts of the Kentucky legislature were accepted and the privileges conferred therein were enjoyed by both the Indiana corporation and its successor, the consolidated company of Indiana and Illinois, with the full knowledge and acquiescence of its directors and stockholders. The averments of the answer are that the first Kentucky act was procured by the old Indiana company and the second act by the consolidated corporation of Indiana and Illinois. No direct evidence was offered on this point, but from the facts which have been adduced it can be easily inferred that all the Kentucky legislation was at the instance of those persons who were interested in the old Indiana and the new consolidated corporations.

208 The next inquiry is whether the Kentucky corporation had power to make the guaranty. By the act of 1882, it was given express authority to indorse or guarantee the principal and interest of the bonds of any railway company then constructed, or to be thereafter constructed, within the limits of the State of Kentucky, and to consolidate its rights, franchises and privileges with any railway company authorized to construct a railroad from the city of Louisville to any point on the Virginia line, such indorsement, guarantee or consolidation to be made upon such terms and conditions as might be agreed upon between the companies. It had, by express statutory authority, leased the Louisville Southern road. The Richmond, Nicholasville, Irvine & Beattyville Railroad Company was a railroad in the State of Kentucky to be thereafter constructed, and when constructed it would continue the Louisville Southern road, then under lease to the New Albany Company, toward the Virginia line. Under these circumstances it would seem to be clearly within the authority conferred for the Kentucky company to guarantee the bonds of the Beattyville Railroad Company

and to acquire its stock as a consideration therefor. It is true that ordinarily one corporation has no power to acquire stock in another, because it involves the investment of the corporate funds in an enterprise over which the corporate officers have no control, and risks them in a business which is foreign to that for which the stockholders advanced their money. But it has been decided that a power to acquire stock in another company may be implied from the power to consolidate with such company as a proper step toward consolidation, or as necessarily included in the grant of so large a power.

Tod v. Kentucky Union Land Co., 57 Fed. R. 48.

Same case in this court, 22 U. S. App. 267.

Hill v. Nisbet, 100 Ind. 341.

The Kentucky corporation here is not only given the right to consolidate with other railway corporations and to lease their roads, but it is given the power to indorse or guarantee their bonds "on such terms and conditions as may be agreed upon between the parties." It seems clear that if a company may guarantee bonds of another company and risk its capital to that extent in another enterprise, the power to make such conditions and terms for the guarantee as may be agreed upon would imply capacity to receive as consideration therefor stock in the company the debts of which are thus contingently assumed. The power to guarantee the bonds of another company is of course given only to obtain a valuable connection and feeder in the company thus aided. The natural and best mode of rendering permanent such a connection short of consolidation is to acquire a majority of the stock in the company. Hence the power to acquire stock may be implied from the very broad power to guaranty.

It is pressed upon us, however, that the Indiana corporation had no power to make the guaranty except on conditions not here complied with which were made indispensable by the Indiana act of 1883, and it is contended that the Kentucky corporation could wield no powers denied to its constituent corporation in the State of its origin. This contention is wholly untenable. Whatever the effect

of the statute of 1883 on the Indiana corporation it did not
209 and could not restrict or in any way narrow the powers of
the Kentucky corporation theretofore created. That derived
its entire authority and power from the State of Kentucky and the
Indiana legislature could not, if it would, restrict or embarrass the
exercise of those powers by a Kentucky corporation in Kentucky.
The question is settled by the case of *Clark v. Bernard*, 108 U. S.
436. In that case the Boston, Hartford & Erie railroad was a corporation created by the State of Connecticut. It purchased the
franchises and railroad of the Hartford, Providence & Fishkill railroad, a corporation of the State of Rhode Island. The State of
Rhode Island then passed an act incorporating the Boston, Hartford & Erie railroad as a corporation of Rhode Island and imposed
as a condition of such incorporation that it should give a bond for
\$100,000. The bill was by the assignees in bankruptcy of the

Boston, Hartford & Erie railroad to restrain the treasurer of the State of Rhode Island from taking possession of securities amounting to \$100,000 which that company had deposited with the State as security for the performance of its bond. It was objected that by its original charter in Connecticut, the Boston, Hartford & Erie Railroad Company had no power to receive a grant of such franchises as those conferred by the legislature of Rhode Island, and therefore that its incorporation by Rhode Island and the acts done under it were null and void. Mr. Justice Matthews, speaking for the Supreme Court, disposed of this claim in the following language:

"It is now argued by counsel for the appellees that the party which, in all these transactions, was dealing with the State of Rhode Island was the Boston, Hartford & Erie Railroad Company, in its character as a corporation of the State of Connecticut; that as such it had no power, under the charter granted by that State, to build or own a railroad directly connecting Boston and Providence, nor had it, as such, any capacity to receive a grant of such a franchise; that, consequently, everything done or attempted in that behalf was *ultra vires* and void.

"But the Boston, Hartford & Erie Railroad Company was also a corporation of Rhode Island. As such it owned and operated a railroad within that State, and had received and exercised franchises under its laws to which it was in all respects subject. It was the assignee of the road and rights connected therewith, formerly belonging to the Hartford, Providence & Fishkill Railroad Company; and it was this corporation, dwelling and acting in Rhode Island, that the legislature, by the act in question, authorized to exercise the additional powers it conferred.

"If it had no previous existence as a corporation under the laws of Rhode Island, it would have become such by virtue of the act in question. For, although as a Connecticut corporation it may have had no capacity to act or exist in Rhode Island for these purposes, and no capacity by virtue of its Connecticut charter to accept and exercise any franchises not contemplated by it, yet the natural persons who were incorporators might as well be a corporation in Rhode Island as in Connecticut; and by accepting charters from both States could well become a corporate body, by the same name and acting through the same organization, officers and agencies in each, with such faculties in the two jurisdictions as they might severally confer. The same association of natural persons would thus be constituted into two distinct corporate entities in the two States, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common either as to name, capital or membership. Such was, in fact, the case in regard to this company, so that in Rhode Island it was exclusively a
210 corporation of that State, subject to its laws and competent to do within its territory whatever its legislation might authorize.

"Nor do we see any reason" (as was said by this court, Mr. Justice Swayne, delivering its opinion in *Railroad Co. v. Harris*, 12 Wall. 65-82) "why one State may not make a corporation of another State,

as there organized and conducted, a corporation of its own, *quo ad* any property within its territorial jurisdiction. That this may be done was distinctly held in *The Ohio & Mississippi Railroad Company v. Wheeler*, 1 Black. 297.

"The same view was taken in *Railway Company v. Whitten*, 13 Wall. 270; in *Railroad Company v. Vance*, 96 U. S. 450; and in *Memphis & Charleston R. R. Co. v. Alabama*, 107 U. S. 581. The question of the powers of the Boston, Hartford & Erie Railroad Company, as a corporation in Rhode Island, and the legal effect of its acts and transactions performed in that State, and not by those of Connecticut, which have no force beyond its own territory. Its results, therefore, that the doctrine of *ultra vires*, as here urged by the appellees, has no place in this controversy."

The doctrine of this case was reaffirmed in that of *Graham v. Boston, Hartford & Erie R. R. Co.*, 119 U. S. 161.

If it be suggested that the restriction of the act of 1883 only affected the internal management of the corporation and the division of control as between the directors and stockholders, and that in the absence of any provision for such internal management in the Kentucky charter, it must be presumed to have been the intention of the Kentucky legislature that the action of the directors of the Kentucky company in making a guaranty should be subject to the same restriction as that imposed on the directors of the Indiana corporation, it may be answered that the Kentucky act of 1882, conferring the power of guaranty on the Kentucky corporation, was enacted before the Indiana statute requiring the assent of the stockholders to a guaranty. Nor can we infer that a power conferred in such general words as that of guaranty in the Kentucky act of 1882 was intended to be restricted in the manner suggested, even if the Indiana act of 1883 had been in force at the time of the former's enactment. The form of the grant negatives such an inference and affirmatively implies that the power is to be exercised in the manner in which such a power, thus generally conferred, is usually exercised. It follows that the Kentucky corporation had the unrestricted power to place a guaranty upon the bonds of another railroad corporation in Kentucky under the circumstances admitted here, without respect to any limitation imposed by the Indiana statute on the constituent Indiana corporation. The guaranty was, therefore, a valid obligation of the Kentucky corporation enforceable against its property in Kentucky.

It is argued on the authority of *Railway Company v. Allerton*, 18 Wall. 233, that the power to enter into such a guaranty could not be exercised by the board of directors, but that it must have had the sanction of the stockholders. In the case referred to, it was held that a stockholder in a railroad company could enjoin the board of directors from exercising the power vested by statute in the company of increasing its capital stock on the ground "that a change so organic and fundamental" could not be made by the directors alone. Certainly if the effect of this case as an authority be limited to the facts of it, it will not sustain the argument based on it. There is nothing in a guaranty of the bonds of a connecting line

211 which changes in the slightest the relations between the stockholders. Counsel rely, however, on the language of Mr. Justice Bradley, in which he says not only that changes in the extent of the membership are fundamental, but also that changes in the object of the corporation are of that character.

He said: "First, as it respects the purpose and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates would be to commit them to an enterprise which they never embraced, and would be manifestly unjust."

It is contended that the guaranty of the bonds of a connecting line is such a change in the purpose and object of the corporation as to be "fundamental." We do not think so. Where the charter of a corporation expressly confers this power for the purpose of securing valuable business connections its exercise is, within the ordinary business transactions of the company, important, it is true, but still not an organic change in the object of the original incorporation. In *Zabriskie v. Cleveland, etc., R. R. Co.*, 23 How. 381, 397, Mr. Justice Campbell, in speaking of the acceptance of a much broader power than that of mere guaranty, said that it was not "such a radical change in their constitution as to authorize members to say that its adoption without their consent is a dissolution."

Mr. Justice Bradley evidently had in mind, in the language quoted, a change in the character of the business like a change from transportation to manufacturing. He shows this by a sentence in his opinion on page 236, where he says: "If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is the stockholders) to make such a change by a stockholders' vote in the regular way."

The guaranty in the case at bar was only permitted by the statute as an incidental benefit to the main business of the corporation, which remained unchanged in character. Reference is made to the opinion of this court in *Humboldt Mining Company v. Variety Iron Works Co.*, 22 U. S. App. 334, in which we said (page 343): "The objection to the guaranty is that it risks the funds of the company in a different enterprise and business, under the control of another and different person or corporation, contrary to what its stockholders, its creditors and the State have the right from its charter to expect." The discussion in that case related to the question whether a manufacturing company, without express power to guarantee the debt of another, was vested with it by implication and for the reason stated above, we held that it was not. The case is very different where, as here, the power to guaranty is expressly conferred without limitation. It is then to be considered as a power merely incidental to the main business of the corporation. The stockholders, the creditors and the State are advised by the charter provisions that the company has another instrument placed in its hands for pursuing the main purpose of its organization, involving an additional risk, and it would be much too rigid a construction

to hold that a provision giving such a power involved a change in "the final cause" of the company, and so required that, in each instance of the exercise of the power, a vote of the stockholders must be taken. The danger from an abuse of such a power in the board of directors is not necessarily an argument against its existence, because many powers of the corporation are and must be exercised by the directors, which are liable to great abuse.

The directors of a corporation are not the mere agents of the stockholders; they are trustees and representatives, charged with the exercise of all the powers of a corporation which do not involve fundamental changes in the purpose of its incorporators, or in the relation of the stockholders. In *Hoyt v. Thompson's Executors*, 19 N. Y. 216, Judge Comstock, speaking for the New York court of appeals, said:

"The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds toward his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former, and if the power of substitution is not conferred in the appointment, it cannot exist at all. But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the State in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals, they may delegate to agents of their own appointment the performance of any acts which they themselves can perform. The recognition of this principle is absolutely necessary in the affairs of every corporation whose powers are vested in a board of directors. Without it the most ordinary business could not be carried on, and the corporate powers could not be executed."

It is now generally held that the board of directors of a corporation may exercise power conferred on the company to issue bonds and execute a mortgage in the absence of an express provision that the power may only be exercised with the assent of the stockholders.

Cook on Stockholders, section 808.

Thompson v. Natches Water and Sewer Co., 68 Miss. 423.

Hodden v. K. & G. R. R. Co., 7 Fed. Rep. 796.

Wood v. Welen, 93 Ill., 153.

Hindee v. Pinkerton, 96 Mass. 387.

It has even been held, though this is more doubtful, that the power to lease a railroad conferred on the corporation owning it, may be exercised by the board of directors without authority from the stockholders.

Beveridge v. The New York Elevated Railroad Co., 112 N. Y. 1-21.

Flagg v. Manhattan R. R., 10 Fed. 431.

But see *Nashua Railroad Company v. Boston R. R. Co.*, 27 Fed. Rep. 825.

If the power to mortgage the entire assets of a company, or to lease its entire plant, does not involve such an organic change for the corporation as to require the assent of the stockholders, it seems manifest that no such change arises from an exercise of the power conferred by statute on a corporation to guarantee the bonds of a connecting company to secure favorable business relations with it.

The conclusion we have reached with respect to the validity and binding character of the guaranty as against the Kentucky corporation, shows that the decree of the court below was erroneous and should be modified, in so far at least as it operated to cause the cancellation of the guaranty as an obligation of the Kentucky
213 corporation and to enjoin suits thereon in Kentucky against the Kentucky corporation.

The original contract of guaranty, however, purported to bind a corporation not only of Kentucky but also of Indiana, and the separate guaranty on each bond is to be given as wide a construction as the contract in pursuance of which it was indorsed. Moreover, where two corporations have the same name and management and are identical in every respect except in the origin of their powers, and in effect are general agents of each other, the presumption from the use of the common name must be that both are intended to be bound, in the absence of some specific restriction in the obligating instrument. There remains to be considered, therefore, the question whether the complainant, The New Albany Company of Indiana, may not be entitled to a decree canceling the guaranty as against it and granting an injunction to prevent suits against it in Indiana. The jurisdiction in equity of the bill rested on two grounds, one, the multiplicity of suits threatened, and the other, the necessity for complete relief by cancellation. In view of the fact that the complainant is now shown not to be entitled to full cancellation or injunction against suits in Kentucky, we might, perhaps, dispose of the case at this point by ordering the bill to be dismissed without prejudice to the right to file a bill as to the Indiana suits in Indiana, because the exercise of equitable jurisdiction, founded on a multiplicity of suits threatened and on the necessity for cancellation of instruments, is somewhat a matter of judicial discretion and dependent on the particular circumstances of each case.

Town of Springport v. Teutonia Savings Bank, 75 N. Y. 397.

Town of Venice v. Woodruff, 62 N. Y. 462, 267.

Tuller v. Percival, 126 Mass. 281.

Hamilton v. Cummings, 1 Johns. Ch. 517.

Smith v. Smith's Adm'r, 30 N. J. Eq. 564.

Story's Eq. Juris., sec. 393.

Beach's Modern Equity, sec. 553 *et seq.*

While the course suggested would, perhaps, be an easier mode of ending the present suit, we think it to be our duty, as it certainly is within our jurisdiction, to proceed to dispose of all of the questions arising upon the record and make an end, so far as we may, of this litigation, which must have been burdensome to all parties.

It is very clear that every one accepting the guaranty was charged with knowledge that by the Indiana act of 1883 the board of directors of the New Albany Company of Indiana had no authority to bind the company by such a guaranty unless a petition for the same had been filed with the board.

Pearce v. M. & I. R. R. Co., 21 How. 441.

Hence it follows that one who knew that no such petition had been filed with the board must have known that the guaranty was not binding on the Indiana corporation and could not hold it to any liability on the same.

It has been argued at the bar that the Indiana act of 1883 does not apply to the guaranty here in controversy. It is said that under the power conferred upon the complainant company by section 3951 of the Indiana Revised Statutes, "to purchase or contract for the use and enjoyment in whole or in part of any railroad or railroads lying within adjoining States" and to "assume such of the debts and liabilities of such corporation as may be deemed proper," the company had the right to buy the controlling interest in the Beattyville Company and contingently to assume the payment of its bonds as a consideration for the purchase, and that nothing in the act of 1883 subsequently passed was intended to restrict this power. It may be that the power to purchase the stock and guarantee the bonds of the Beattyville Company can be found within the four corners of section 3951, but even if that be so, which we do not decide, we are of opinion that the necessary effect of the act of 1883 was to require that thereafter where a guaranty was deemed a proper means in the exercise of the power conferred by section 3951, it could only be used with the consent of a majority of the stockholders. Of this view was the circuit court, and we concur therein.

Unless, therefore, the appellants are *bona fide* purchasers of these guaranteed bonds without notice of the defect in the guaranty, due to the absence of a petition for the same by the stockholders, they have no cause of action against the New Albany Company of Indiana. Upon whom is the burden in this case, in respect to the issues of *bona fides* and want of notice need not be now discussed? It suffices here to say that no matter what the rule in this regard, all but two of the appellants are indisputably shown by the record to have purchased the guaranteed bonds in good faith without any notice of the defect in the guaranty. We proceed, therefore, to consider the case of such *bona fide* purchasers, reserving until the close of the opinion a discussion of the question of notice to the two other appellants referred to. It is contended by the counsel for the appellee and it was held by the circuit court that the guaranty without the stockholders' petition was void, because clearly beyond the power of the company. The principles of law and the distinctions which apply in considering the defense of *ultra vires* set up by a corporation are now so clearly laid down in cases decided in the Supreme Court of the United States and in the House of Lords and the courts of appeal in England that there is no difficulty in their application

except where doubt arises over the construction to be placed upon particular and ambiguous words of the statute or the instrument conferring and limiting the powers of the corporation. In the Central Transportation Company *v.* Pullman's Palace Car, 139 U. S., Mr. Justice Gray, in delivering the opinion of the Supreme Court, examined all the leading cases in that court and in England and stated their result as follows:

"The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers were unlawful and void, and no action can be maintained upon them in the courts, and this upon three grounds, the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken, and above all the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

By application of this principle, the learned judge in the lower court reached the conclusion that the guaranty here in question was void. We think the principle was misapplied. The general
215 scope of the powers conferred upon the New Albany Company, included the power to make guaranties like this. The consent of the stockholders was a mere regulation of the mode of exercising the power. The same learned justice whose language we have quoted above from Central Transportation Co. *v.* Pullman Palace Car Co., *supra*, delivered the opinion of the supreme judicial court of Massachusetts in another leading case upon the subject of *ultra vires* contracts of corporations (*Davis v. The Old Colony R. R.*, 131 Mass. 258), and enunciated the same conclusion as that above given; but in the course of the opinion he said (p. 260): "There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland, Col. & Cin. R. R.*, 23 How. 381, 389, by Mr. Justice Hoar in *Monument Bank v. Globe Works*, 101 Mass. 57 and 58, and by Lord Chancellor Cairns and Lord Hatherly in *Ashbury R'y Carriage & Iron Co. v. Roche*, L. R. 7 H. L. 668, 684, between the exercise of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in particular instance when such abuse or failure is not known to the other contracting party." We do not doubt that the guaranty without a petition of the stockholders here was of the latter class, and that it was not, to use the language of Lord Cairns above cited, "anything more than an act *extra vires* the directors but *intra vires* the company."

Of course, the point under discussion turns on the construction of the statute. The first and most important section provides that the board of directors of any Indiana railway company, whose line extends across the State, may, upon the petition of the holders of a majority of its stock, direct the execution by such railway company

of an indorsement guaranteeing the payment of the bonds of the railway company of an adjoining State, the construction of whose line of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds. The next section provides that the petition shall state the facts showing the benefits to be derived from the guaranty, and the final section limits the power of guaranty by limiting the liability which may be thus incurred to an amount equal to one-half of the capital stock of the guaranteeing company.

The requirement that in the exercise of the power of guaranty, the initiative should be taken by the stockholders by petition was a regulation of the internal management of the corporation for the benefit and protection of the stockholders, and a statutory division of power between them and the directors, but it was not a limitation upon the power of the corporation in the sense that a guaranty without such a petition would be a violation of the corporation's charter rights justifying an ouster from them by *quo warranto*. If it were the latter, then the corporation having by its directors made such a guaranty without a petition could never be estopped to deny its validity, however completely the stockholders might subsequently have acquiesced in the same by silence after knowledge. An act which is plainly in excess of the powers of a corporation cannot be made valid by the acquiescence of all the stockholders. If this power

216 of guaranty had been given with respect to bonds of railway corporations of Illinois and not of Kentucky, it is manifest that a guaranty of the bonds of a Kentucky company could never have been ratified even by a unanimous vote of the stockholders. The requirement for the petition contained in the Indiana act of 1883, however, could be waived by the stockholders by subsequent conduct. This is settled conclusively by the decision of the Supreme Court of the United States in *Zabriskie v. The Cleveland, etc., Railroad Company*, 23 How. 381. There a statute, which was construed by the court to confer upon an Ohio railway corporation the power to guaranty the bonds of an Indiana corporation, provided that the guaranty should not be entered into until a meeting of the stockholders of the company should be called and the holders of two-thirds of the stock should have assented thereto. It was conceded by the court that the meeting and vote, though attempted, had not been had in accordance with the statute, but it was held notwithstanding that the stockholders by their subsequent silence and failure to object for several years had estopped themselves and the corporation from asserting that the condition of the statute had not been complied with. The manifest sequence is that the provision for a stockholders' meeting was alone for the benefit of the stockholders, and that the State and the public had no interest to enforce it if those for whose protection it had been enacted were willing to let its violation go unchallenged. Referring to the same proviso as that considered in the *Zabriskie* case the supreme court of New York, in *The Connecticut Mutual Life Ins. Co. v. Cleveland, etc., R. R. Co.*, 41 Barb. 9-24, said that "these provisos

were intended for the protection of the shareholders, and relate rather to the mode or manner of the execution of the power."

This view of the purpose and effect of such a provision is enforced by the construction put by the Supreme Court of the United States on a statute of Illinois much more emphatic and prohibitory in form than that here in controversy in *St. Louis R. R. Co. v. Terre Haute R. R.*, 145 U. S. 393. The act there provided that it should not be lawful for a railroad company of Illinois to lease a railroad in another State without having first obtained the written consent of all the stockholders of said roads residing in the State of Illinois, and any contract for such lease made without having first obtained said written consent should be null and void. Of this the Supreme Court, speaking by Mr. Justice Gray, said: "Although this statute in terms declares that any such lease, made without the written consent of the Illinois stockholders, 'shall be null and void,' it would seem to have been enacted for the protection of such stockholders alone and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be satisfied by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time or otherwise, to deny." Mr. Justice Harlan, at the circuit, took the same view of a similar statute in *Hervey v. Midland R'y Co.*, 28 Fed. Rep. 169, 174. In *Beecher v. The Marquette, etc., Pac. Rolling Mill Co.*, 45 Mich. 103, Justice Cooley, speaking for the supreme court of Michigan of a similar provision, said (174): "The statute now under consideration was passed to protect the interests of stockholders in mining companies. It intends that their mining property shall not be conveyed away or mortgaged except by their deliberate action after they have been notified of a proposal to do so, and have had time to deliberate upon and fully consider it. But the matter does not concern the public at large; no principle of public policy is at stake, no wrong direct or indirect is done to any human being if conveyance is made or mortgage given without the exact notice required unless it be a wrong to the stockholders themselves. And as others are not concerned, why should the statute give them the right to raise questions of regularity which the stockholders elect to waive. We are satisfied such was not its purpose." In *Thomas v. The Citizens' Horse Railway Co.*, 104 Ill. 462-467, the supreme court of Illinois said of a like statute that it "was no doubt passed for the protection of stockholders. It is a matter in which the public have no interest." There are but two cases which we have found that may possibly support a different theory. In *Commonwealth v. Smith*, 10 Allen, 448, the Commonwealth of Massachusetts held a first mortgage and two subsequent mortgages on the Troy & Greenfield railroad. After the first mortgage, the company made a mortgage to secure bonds amounting to \$600,000 as a second mortgage. The bonds were sold in the market to private persons. This was a bill by the Commonwealth, as the holder of the two subsequent

mortgages, to have the second mortgage declared void. The statute authorized the issue of bonds, and a mortgage "provided however that such corporation shall by a majority of votes at a meeting of its stockholders called for that purpose be authorized to issue the same and provided that the bonds so issued shall in no case exceed the amount of capital actually paid in by the stockholders of said company." The capital stock paid in was only \$143,000. The statute provided for bonds running twenty years, and the bonds in question ran thirty years. After deciding that the railroad company had no common-law power to mortgage its property, the court held that the statute prescribed the conditions on which bonds and a mortgage could be issued, and that if they did not conform they were made in violation of law and were therefore void; and that these bonds and mortgages were void because they were in excess of the capital stock paid in and ran for thirty years. Said the court, "The legislature did not mean that such bonds should be made. The illegality is apparent upon their face and open equally to the knowledge of the party who issued and the party who received." The language of the court certainly implies that corporate power to mortgage did not exist in the absence of the assenting meeting of the stockholders, but its weight as authority is much affected by the fact that the case before the court did not call for an expression of opinion on that point. More than this, the court was dealing with a case where the bondholders were advised of the departure from the statutory requirements, and it was therefore hardly necessary to make any distinction between acts which were *ultra vires* the corporation and those which were only *ultra vires* the directors. The case of *The Commercial Bank of Canada v. The Great Western R'y Co. of Canada*, 3 Moore's Privy Council Cases N. S. 295, may also perhaps be classed as an authority in conflict with the cases first above cited. As we shall have occasion to discuss this case at some length hereafter in its relation to another but closely allied principle of law, we pass it now with the remark that it is in conflict with the weight of authority in this country and especially with the language of the Supreme Court of the United States, *St. Louis R. R. Co. v. Terre Haute R. R. Co.*, 145 U. S. 393, above quoted, which has, of course, controlling weight with us.

It has been pressed upon us in this court, and was considered worthy of weight by the learned judge in the court below, that without the statute containing the requirement for a petition, the company would have had no power to make a guaranty at all, and that the condition must, therefore, be regarded as a limitation upon the power rather than a mere internal regulation for the protection of stockholders. The distinction is too fine for practical application. Whether the power exists by implication before the statute or not, the statute is intended, after its passage, to be the only source of the power, and if the act imposes conditions or limitations on its exercise, they are as mandatory in the case of a power before implied as in that of one newly created. In the case of *The St. Louis R. R. v. Terre Haute R. R.*, 145 U. S. 393, 402, already quoted, the

powers affected by the statute there construed were those of consolidation and lease, neither of which can exist without an express statutory source.

In England joint-stock companies are formed under general laws, and the incorporators are required to execute and file or register in a public office an instrument in some acts called the deed of settlement, in others, the memorandum and articles of association. Their effect is quite like the charter and articles of incorporation in this country, and the public are charged with notice of their contents. It is not an infrequent provision in the deed of settlement or the articles that certain powers shall not be exercised by the board of directors until the assent of the shareholders at a general meeting has been procured. It is usually held by the courts of England that such a requirement is a preliminary formality or regulation of the internal management of the company, the absence of which does not render the exercise of the power absolutely void and incapable of ratification when relied on by one without notice of the defect.

Royal British *v.* Turquand, 6 E. & B. 327.

Agar *v.* Life Assurance Society, 3 C. B. N. S. 721.

Fountaine *v.* Carinathen R'y Co., L. R. 5 Eq. 316.

The Colonial Bank of Australasia *v.* Willan, L. R. 5 Privy Council Appeals, 417, 448.

Irvine *v.* Union Bank of Australasia, 2 Appeal Cases, 366.

In re Tyson Reef Co., 3 Wyatt, Webb & A'Beckett (Victoria Rep.) Law 162.

The case of *The Commercial Bank of Canada v. The Great Western Railway of Canada*, 3 Moore's Privy Council Cases, N. S. 295, already alluded to, is the only case taking a different view.

As it thus appears that the defect in the guaranty does not make it a clear and palpable excess of the charter power of the company and void, but only an abuse of a general power or a breach of a regulation for its exercise, its binding character depends on the knowledge, express or implied, which the holder of the guaranty had of the defect when he advanced money or thing of value

219 on the faith of it. *Eastern Counties Railway Company v.*

Hawkes, 5 H. L. C. 331, per Lord Campbell *in arguendo*, page 338, and Lord St. Leonards, page 373; *Davis v. Old Colony Railroad*, 131 Mass. 258, 260. He is of course charged with full knowledge of everything in the statute or charter incorporating the company, whether it relates to the general powers of the company or to the mode and manner of their exercise, or to the authority of the directors or the officers or any matter of internal management therein set forth. And this applies as well to the articles and memorandum of association or the deed of settlement of an English joint company as to the statute, charter and articles of incorporation of a corporation of this country.

Ernest v. Nicholls, 6 H. L. C. 418.

Pearce v. Madison R'y Co., 21 How. 441.

If, therefore, by comparing the written evidence of corporate action, which is made the basis of a claim against the corporation, with the publicly recorded evidence of its powers and manner of exercising them, it can be seen that the act is a departure in any substantial respect from the requirements set forth therein, that which purported to be a contract is not binding as such upon the corporation. But the case is very different when the act in question upon which it is sought to base corporate liability seems to be within the corporate powers and the required mode of exercising them, and yet in fact is for a purpose not warranted by the charter, or is defective because of a failure to comply with some regulation upon which the authority of those acting for the corporation is made by the charter to depend. In the first class of cases, to wit: when the act is on its face within the power of the corporation, those who, in dealing with the corporation, advance money or change their position on the faith of the validity of the act without notice of anything to the contrary may hold the corporation, however *ultra vires* the purpose of the act may in fact have been. Thus it was held by the House of Lords in *Eastern Counties R'y Co. v. Hawkes*, 5 H. L. C. 331, that a railway corporation which had entered into a contract to buy land for use in building its line would not be heard to say in defense to an action for specific performance that it needed only a very small part of the tract for its line and therefore had no power to acquire the rest, when it appeared that the owner of the land had no reason to suppose that the company was not about to use the land for legitimate corporate purposes. The same principle is illustrated in cases where a corporation with power to issue negotiable paper in its business issues it for an *ultra vires* purpose, as, for instance, for the accommodation of another. If the paper in such a case reaches the hands of a *bona fide* purchaser for value, without notice of its illegal purpose, the corporation is liable thereon and cannot show the real purpose of its issue to escape payment.

Farmers' National Bank v. Sutton Mfg. Co., 6 U. S. App. 312.

Monument Bank v. Globe Works, 101 Mass. 57.

Madison & Indianapolis R. R. Co. v. Norwich Savings Society, 24 Ind. 457.

National Bank of the Republic v. Young, 41 N. J. Eq. 531.

Stoney v. American Ins. Co., 11 Paige, 635.

220 *Credit Company v. Home Machine Co.*, 54 Conn. 358.

Peruvian Railway Co. v. Insurance Co., L. R., 2 Ch. 617.

Webb v. The Commissioners of Herne Bay, L. R. 5 Q. B. 642.

The principle of these cases is that where a corporation does an act which has the appearance of one within its charter powers, the public without notice to the contrary, in dealing with the corporation has the right conclusively to presume that the act is valid and to proceed on that presumption.

The case at bar, however, comes under the second class of cases above referred to, where a seeming act of the corporation is defect-

ive because of a failure to comply with some preliminary condition, upon which the authority of those acting for the corporation is made by the charter to depend, and the question we have before us is whether one of the public dealing with the corporation in such a case has a right, in the absence of notice to the contrary, to presume that the condition has been complied with, and, in case he advances money on the faith of it, to hold the corporation in spite of the defect. The discussion involves a branch of the law of agency. In some jurisdictions, especially in the courts of New York, it is laid down that in every case where a principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice.

North River Bank v. Aymar, 3 Hill, 262.

Griswold v. Haven, 25 N. Y. 595.

New York & New Haven R. R. Co. v. Schuyler, 34 N. Y. 30.

And so it was held in *Bank of Batavia v. New York R. R. Co.*, 106 N. Y. 195, that a bill of lading fraudulently issued by an agent of a railroad company without receiving the goods rendered the company liable to one advancing money on the faith of its validity and without notice of the defect. The Supreme Court of the United States has refused to carry the principle thus far, and holds that the agent's authority to issue bills of lading depends on the receipt of the goods, and that the bill of lading issued without receiving the goods is void into whosoever hands it may come. The reason given for this ruling is that a bill of lading is a mere non-negotiable contract to carry goods, and that no subsequent holder has any better standing to enforce it than the first one receiving it, who must have known that goods were not received.

Friedlander v. Texas, etc., R'y Co., 130 U. S. 416.

Pollard v. Vinton, 105 U. S. 7.

Missouri Pacific v. McFadden, 154 U. S. 155.

Iron Mountain R'y Co. v. Knight, 122 U. S. 79.

The Lady Franklin, 8 Wall. 325.

The Delaware, 14 Wall. 579.

Schooner Freeman v. Buckingham, 18 How. 182.

221 But in the *Friedlander* case there is a plain intimation that the decision would not be applicable in the case of a negotiable instrument, for Chief Justice Fuller, in delivering the opinion of the court, says on page 423, "Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith

on his part. But bills of lading answer a different purpose, and perform different functions." And in *The Merchants' Bank v. The State Bank*, 10 Wall. 604, the Supreme Court adopts the principle of the New York courts, stated above, as applicable at least to negotiable paper issued in the name of a corporation by one of its officers, whose authority was defective in fact, but not apparently so.

In the case at bar, the statute of 1893 authorized the board of directors to indorse the guaranty on the bonds of another railway. Now that guaranty was as negotiable as the bonds which bore it. There has been in the books an irreconcilable conflict over the question whether a guaranty on a promissory note signed by the payee has the same effect to transfer the note as an indorsement (*Brandt on Suretyship and Guaranty*, vol. 1, sec. 47; *Daniel on Negotiable Instruments*, 2, XXI vol., 1776, 1777), and it is settled in the courts of the United States that such a guaranty of a promissory note is not a negotiation of it by the law merchant.

Trust Co. v. National Bank, 101 U. S. 68.

But the question here is a very different one. The bonds here were payable to bearer, and needed no indorsement, according to the law merchant, to pass title. Title to them passed by delivery. The contract of guaranty was made in terms with the holder of the bond. As the bond passed from one to another, a new contract of guaranty arose between the guarantor and each successive holder, just as the obligor of the bond assumed a new contract relation with the same person, and every such contract was wholly unaffected by equities unknown to the then holder which might have arisen between either the obligor or the guarantor and previous holders. If, as is held by the Supreme Court of the United States in *Carpenter v. Longan*, 16 Wall. 271, a mortgage securing the payment of a negotiable instrument is not any more subject to equitable defenses than the note of which it is the incident, it would seem, *a fortiori*, that a guarantee indorsed on a negotiable bond payable to bearer must, by its relation to the principal obligation, acquire the same attribute of negotiability. The language of Mr. Justice Campbell in *Zabriskie v. The Cleveland, etc., R. R. Co.*, 23 How. 381, leaves little doubt that such guaranties, like the bonds, rightly challenge confidence wherever they go and partake of the same quality of negotiability. This conclusion is also in accord with the spirit of the decision of the Supreme Court in *Railroad Co. v. Schutte*, 103 U. S. 118. See also *Ketchall v. Burns*, 24 Wend. 456; *Toppan v. Cleveland, etc., R. R. Co.*, 24 Fed. Cases, 56.

The Kentucky statutes (General Statutes, chap. 22, secs. 6, 13, 14), with respect to the negotiability and assignability of bonds and promissory notes, have no application to bonds like these
222 payable to bearer. They apply only when an assignment is necessary to pass the title to the chose in action. There is a close analogy in this regard between the proper construction of the Kentucky statutes referred to and that of the section of the Federal statutes restricting the jurisdiction of the circuit courts in suits to

enforce choses in action brought by the assignee of the original obligee.

City of Lexington v. Butler, 14 Wall. 382.

It is often said in cases of this general character that until the agency to make the instrument is established it is immaterial whether it is negotiable or not. While this is true in one sense, in another it ignores a palpable distinction to be observed in cases of agency by estoppel, which rest rather on the appearance of authority than upon actual authority. Where an agent is an agent to issue negotiable paper of any kind or under any circumstances, his appearance of authority is greater than where he can make only non-negotiable contracts. His signature to a negotiable instrument if valid in any class of cases has the appearance of validity in all, because negotiable instruments rarely disclose their purpose, and are adapted to be a circulating medium between many. It is to be inferred, therefore, where a principal gives to an agent authority to put in circulation negotiable paper in a certain class of cases, he knows he is giving his agent an appearance of authority in any case in which the latter may issue paper, whether authorized or not, and that he runs the risk of loss by such abuse of authority should it induce an innocent third person to advance money on his unauthorized paper. The statute of Indiana should bear the same construction as the act of the principal in the case supposed. Therefore, when the legislature of Indiana vested the directors with power to place a negotiable guaranty on negotiable bonds, liable to circulate from hand to hand in the markets of the world and challenging confidence wherever they should go, can we suppose that it intended every purchaser to satisfy himself by personal inspection of the records of the corporation or otherwise, that a petition by stockholders had preceded the directors' action? Mr. Justice Brewer said, in *Blair v. The St. Louis, H. and K. R. R. Co.*, 25 Fed. Rep., 684: "I do not understand that a man dealing with a private corporation, or even a quasi-public corporation like a railroad, is bound to take notice of what the records of that corporation show, for if it be so, no man can deal with a corporation in safety without first having access to, and an examination of, its books, and the converse of that would be true, that such a corporation is bound to show its records to whomsoever has dealings with it." If the legislature had intended the public to advise itself of the filing of the stockholders' petition, it would have provided for some public record of it. *Irvine v. Union Bank of Australia*, L. R. 2 Ap. Cases, 366. As the directors are usually the corporation's representatives in its dealings with the public, is it not reasonable to infer that the legislature intended the restriction to operate as between the stockholders and directors, and not to defeat the claims of those parting with money on the faith of the validity of the directors' action? The fact that the guaranty was to be negotiable suggested the necessity that the contract should carry on its face indisputable evidence of validity, and its object would be seriously impaired if

223 the public were compelled to act at their peril on the implied assurance of those in whom the power to guarantee was vested, that the essential preliminary of a stockholders' petition had been complied with. It is a mistake to suppose that such a construction of the statute destroys the protection of the act to stockholders. They may enjoin the directors from guarantees without their consent, and they may hold the directors personally liable for unauthorized action. They have a much better opportunity to observe their directors and keep them within the restriction of the statute than have outsiders to learn whether the restriction has been violated. We think this a case for the application of the principle above stated, which may properly be called the New York rule of agency, that where an agent is clothed with authority to act for his principal upon the happening of an extrinsic fact, peculiarly within the knowledge of the agent, and not known to the public, or within its usual means of knowledge, his acting is an implied representation, binding on his principal, to those dealing in good faith with him as agent, that the extrinsic fact exists upon which his authority depends.

The guaranty bore the seal of the corporation affixed by its secretary and the signature of the corporation by its president. *Prima facie*, these imported corporate action. *Koehler v. The Black River Falls Iron Company*, 2 Black. 717. They raised the presumption that the guaranty had been ordered to be made by the board of directors. This was the fact. The case, then, is as if the purchaser of each bond knew that the resolution of the board had been passed and the only question is whether with that knowledge he had a right conclusively to presume that a petition of stockholders had been filed. On the law of agency applicable to agents authorized to issue negotiable paper, we think, for the reasons stated that he was.

We are, however, not compelled to rest alone on general rules of the law of agency applying to the issuance of negotiable paper, for the case at bar falls within a class of cases having sole application to the transactions of corporations and not confined to negotiable instruments. By reason of the peculiar organization and limited membership liability permitted by the law to such artificial persons of its own creation, public policy often clothes those who represent corporations in dealing with the public with a greater apparent authority than the charter rules for the internal management of the corporation really give them, and puts upon the members of the corporation the burden of preserving the limitations of their agents' authority in transactions with an outsider who has no opportunity or reason for knowing whether the limitations have been violated. The maxim "*Omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium.*" is applicable to everything done by a corporate officer (*United States Bank v. Dandridge*, 12 Wheaton, 63, 70), and when, in a certain class of cases, one, in good faith, has advanced value on the faith of the presumption, it is not permitted to the corporation to prove the contrary. The class of cases is where the act in question is that of one representing the corporation as a general

agent whose authority depends on compliance by himself or other members or agents of the corporation with preliminary regulations. In cases of this class the presumption of regularity against the corporation is conclusive. The rule is founded chiefly on the very

224 limited opportunity of the public to know with certainty the circumstances of the internal management of a corporation.

It has been frequently applied to a corporate regulation like that in the case at bar, imposing as a condition precedent to the authority of directors in a given matter a vote by the stockholders.

The leading case upon this point is *Royal British Bank v. Turquand*, 6 Blackburn & Ellis, 327. In that case the declaration was on a bond of a railway company of which the defendant was official manager. It was signed by two directors under the common seal. The plea was, that by the 50th section of its deed of settlement it was provided that the board of directors might borrow on bond, in the name and under the seal of the company, such sum as should be authorized to be borrowed, and that no such resolution had been passed and that the bond had been given without the authority of the shareholders of the company. On demurrer the plea was held bad, first in the Queen's Bench, Lord Campbell presiding, and then on error in the exchequer chamber, where Jervis, chief justice, delivered the only judgment, and it is so short that it may be quoted in full. He said:

"We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more, and the party here reading the deed of settlement would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

In this judgment Pollock, C. B., Alderson, B., Creswell, J., Crowder, J., and Bramwell, B., concurred. The case has been strongly approved in the House of Lords in the Irish case of *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869. See the opinion of the judges delivered by Chief Baron Kelly and the judgments of Lords Hatherly and Penzance. It has been followed in England in quite a number of cases where the required assent of shareholders was actually wanting to a corporate act of the directors apparently in due form. Such are *Agar v. Life Assurance Society*, 3 C. B. N. S. 721; *Fountaine v. Carmathen R'y Co.*, L. R. 5 Eq. 316; *The Colonial Bank of Australasia v. Willan*, L. R., 5 Privy Council Appeals, 417, 448; *In re Tyson Reef Co.*, 3 Wyatt, Webb & A'Beckett (Victoria Reports Law) 162. The principle is approved in many other cases. See *Prince of Wales v. Harding*, E. B. & E. 181. *In re Athenæum Society*, 4 K. & J. 549; *In re Land Credit Co.*, L. R. 4 Ch. 460; *In re County Life Assurance Co.*, L. R. 5 Ch. 288; *County of Gloucester Bank v. Rudry Merthye Colliery Co.* (1895), 1 Ch. 629.

It has been urged by way of *reductio ad absurdum* that the same reasoning which raises a conclusive presumption of regularity in favor of a stranger advancing money on the faith of action by the directors would require that the presumption arising from the affixing of the seal by the secretary and the signature of the corporation by the president that the board of directors ordered them upon due authority received from the stockholders, should be equally conclusive. It is not necessary for us to decide the question suggested until it arises.

225 It will suffice to point out the manifest distinction between such a case and the one under discussion. The secretary and the president, in affixing the seal and signature, are mere ministerial officers. They have no discretion to exercise in the matter of a guaranty. They are the mere subagents of the corporation, the fingers of the board of directors, so to speak in this matter, and it would seem that in a case in which not only the action of the directors is necessary, but that of the stockholders is also required, the unauthorized use of the seal by the secretary, or of the name of the company by the president to give appearance of validity to a pretended guaranty would be as far short of binding the company as a forgery. The distinction is referred to by Lord Hatherly in *Mahony v. East Holyford Mining Company*, L. R. & H. L. 869, 899, in pointing out that the case of *Bank of Ireland v. Evans Charity*, 5 H. L. Cas. 389, was not in conflict with the rule established by *Royal British Bank v. Turquand*. There are three cases in the English books where a resolution of shareholders necessary to the directors' authority was absent and the principle of *Bank v. Turquand* was not applied. The earliest of these is *Ernest v. Nicholls*, 6 H. L. Cases, 400. It was decided in the House of Lords after the decision of *British Bank v. Turquand* in the Court of Queen's Bench and before its decision in the exchequer chamber. The suit was by the official representative of one defunct insurance company against that of another to compel the latter to pay the amount due on a policy of life insurance in accordance with an indenture properly executed by the requisite number of directors of the two companies. The deed contained a covenant by the defendant company that in consideration of the transfer to it by the deed of all the trade and good will of the plaintiff company it would assume and pay all the policies of the plaintiff company then outstanding. Each company had the requisite statutory power to make the deed. The 29th section of 7 and 8 Vict. C. 110, regulating the management of such companies, provided, however, that when any director was interested adversely to the company in any contract entered into by the company, "then the terms of such contract or dealing shall be submitted to the next general meeting of the shareholders to be summoned for that purpose, and no such contract shall have force until approved and confirmed by a majority of votes of the shareholders present at such meeting." It appeared from the registered deeds of settlement that one Collingridge was the managing director of one company and a director in the other, and that the making of the transfer and its terms was entirely his work, representing both sides.

He signed the deed for the plaintiff company. The House of Lords held that the deed was void under section 29, because it appeared in the evidence that no general meeting was held in accordance therewith. Lord Wensleydale, in giving judgment, said (page 418), referring to the board of directors: "The stipulations of the deed which restrict and regulate their authority are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made, unless they are strictly complied with. The contract binds the person making it, but no one else." This language, though delivered in the House of Lords by a judge of the greatest eminence (Baron Parke) and a law lord, was very soon distinctly repudiated as authority 226 by the courts of Queen's Bench and common pleas as extra-judicial and not necessary to the decision. *Prince of Wales v. Harding*, E. B. & E. 181; *Agar v. Life Assurance Society*, 3 C. B. N. S. 721, and the criticism thus made has been acquiesced in ever since. In commenting on the decision, Lord Campbell, in *Prince of Wales v. Harding*, says: "We are, of course, bound by the judgment of the House of Lords in that case; and we should all most heartily have concurred in it, the question having been as to a special contract to do the very unusual thing of purchasing by one company the trade of another. But we are not bound by the extra-judicial observations of any noble and learned lord, delivered in that assembly, although they are, no doubt, entitled to high consideration." Now it must be conceded that, in this language of Lord Campbell, there is color for the suggestion that the rule laid down in *Bank v. Turquand*, and followed in the case he was then deciding, applied only to the exercise of those powers usually exercised by corporations, like that of borrowing, and not to extraordinary powers, like that which was attempted to be exercised in *Ernest v. Nicholls*, and it may seem to support a suggestion of the same distinction between the *Turquand* case and the case at bar on the theory that a guaranty of railroad bonds is quite as unusual a transaction as the sale and purchase of the trade and good will of an insurance company. The distinction, however, is never again alluded to in the long line of cases in which *Bank v. Turquand* is followed. The real and palpable difference between *Ernest v. Nicholls* and *Bank v. Turquand* is that in the former case the two companies were engaged in a transaction in which, to the knowledge of each, the agreement was being made and executed by one who was acting as agent for both, and by virtue of section 29 as well as of ordinary rules of human action, neither had a right to rely on the presumption of regularity in the conduct of a representative with such a divided allegiance. The next case is that of *The Commercial Bank of Canada v. The Great Western R'y of Canada*, 3 Moore's Privy Council Cases, N. S. 295, decided in 1865. In that case the action was brought by a bank against the Great Western R'y Co. to recover a large sum of money advanced to the latter and disbursed on its order to assist in the construction of a connecting line. The statute of Canada permitted the railway com-

pany to use its funds for this purpose "provided that no such expenditure shall be incurred unless sanctioned by a vote to that end of two-thirds of the shareholders specially called for the purpose." A meeting was held and authorized the advance of a certain sum considerably less than that subsequently advanced, and the question was in reference to the excess. The judicial committee of the privy council held that the bank could not recover. Lord Chelmsford delivered the judgment for himself and Lords Justices Turner and Knight-Bruce. He distinguishes the case from *Bank v. Turquand* as follows: "The words of the act are negative and prohibitory. 'No such expenditure shall be incurred unless by a vote to that end of two-thirds of the shareholders.'" The case differs in this respect from *The Royal British Bank v. Turquand*, for there the clause of the deed of settlement was an empowering clause, enabling the directors to borrow on bonds such sums as should, from time to time, by a general resolution of the company, be authorized to be borrowed, and this very distinction was taken by Chief Justice Jervis in that case, for after observing that parties dealing with the bank were not bound to do more than read the statute and the deed of settlement, he adds: "And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions." In a part of his judgment just preceding, reference is made by Lord Chelmsford to the extraordinary character of the power, as a reason why the bank should have examined the statute to learn the conditions of its exercise, but the only distinction attempted to be made between this case and *Bank v. Turquand* is as above. With deference to the high standing of the judges and the tribunal rendering this judgment, it is submitted that the distinction made is without a difference, and is a mere verbal nicety having no substantial foundation. But even if the distinction is tenable, the language in the case at bar is permissive on condition, as in the *Turquand* case, and is not prohibitory in form as in the *Commercial Bank* case. Nor can any distinction be logically founded on the so-called extraordinary character of the power. One dealing with the company is as much charged with exact knowledge of the conditions, if any, upon which usual powers are to be exercised as of those imposed in the exercise of unusual powers, because he is bound to read the statute and deed of settlement in either case. There is no suggestion in the judgment (and if there were it would have little reasonable foundation) that the board of directors of a corporation are any more likely to act without a compliance with preliminary regulations in the case of unusual powers than in the case of those more frequently exercised, or that the one who deals with a corporation has any better means of informing himself as to compliance in the one case than in the other.

It should be noted as a distinction between the cases of *Ernest v. Nicholls* and *Commercial Bank of Canada v. Great Western Railway* and the one at the bar that the instruments upon which liability was asserted in the former cases were not negotiable. It is

reasonable that the presumption of regularity should have more force in cases of instruments designed to pass from hand to hand as "couriers without luggage," than in the case of non-negotiable contracts. *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642.

The doctrine of *Bank v. Turquand* is that the resolutions at meetings of stockholders are part of "the indoor management" of the corporation, as Lord Hatherly calls it in *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869, 894 (see similar expressions by the same judge in *Fountain v. Carmathen R'y Co.*, L. R. 5 Eq. 316, 322, and *In re Athenæum*, 4 Key & J. 549); and that the public cannot be expected to inform themselves of that of which the proper evidence is to be found only in the books and records of the company, to which they have no access. The history of the adoption of the rule is not difficult to trace. Joint-stock companies in England were nothing but special statutory partnerships endowed with corporate character. In partnerships every active or managing partner was the general agent for all, and his ostensible authority was not limited by special arrangements between the partners. When the liability of the statutory partnership was asserted by reason of the acts of the directors or managing partners, the disposition

228 of the courts of England was not to enlarge the limitations of responsibility conferred by the statute as an unusual privilege on the company, but to confine them to cases where the outsider dealing with the corporation through such managers had some convenient means of knowing that the limitations of the law had been transgressed. The whole doctrine grows out of the difference in the opportunity for knowing the facts between the shareholders and directors on the one hand, and the public dealing with the corporation on the other. The third English case involving the effect of a failure to pass a required resolution of stockholders upon the contract of a corporation in which the *Bank v. Turquand* was not applied, shows this in a neat way. The case is that of *Irvine v. Union Bank of Australia*, 2 Appeal Cases, 366. A company defended against an equitable mortgage on its property executed by its directors for an amount advanced by one creditor in excess of the amount allowed by its articles of association. The amount of allowed indebtedness under its articles might have been increased by a vote at a general meeting of stockholders. The contention was that the mortgagee had the right, according to *Bank v. Turquand*, to presume from the action of the directors that such a meeting had been held and the proper authority given. Answering this argument Sir Barnes Peacock, who delivered the judgment of the privy council, said (page 379):

"In the present case, however, the bank * * * must have known that if the general powers vested in the directors, by section 50, had been extended or enlarged by a resolution of a general meeting of the shareholders under the provisions of section 31, a copy of the resolution ought, in regular course, to have been forwarded to the register of joint-stock companies in pursuance of section 53, of the companies' act, and would have been found among his records. Their lordships are of opinion that the learned recorder was correct

in holding that this case is different from that of *Royal British Bank v. Turquand*."

Thus it appears that where, by law, any fact in the internal management of the company is required to be recorded in a public office, the presumption of regularity does not apply, and as to it, the outsider dealing with the company must advise himself. The same distinction, founded on the opportunity for knowledge or the contrary, is seen in those cases, where it is held that the requirement that a mortgage shall be registered in the books of the company avoids a mortgage unregistered in the hands of a director or stockholder. *Ex parte Valpy & Chaplin*, L. R. 7 Ch. App. 289; *In re Native Ore Co.*, 2 Ch. D. 345; but does not affect the validity of such a security held by an outsider. *In re Intern. Pulp Co.*, 6 Ch. D. 556; *In re South American Co.*, 2 Ch. D. 337; *In re Hercules Ins. Co.*, L. R. 19 Eq. 302; *In re Gen. Peor Assur. Soc.*, 14 Eq. 507.

Coming now to the American cases, we may be very sure that the courts of this country have not laid down any more stringent rule against those dealing with corporations than the English courts, for it is well understood that on questions of corporate authority and transactions *ultra vires* the corporations or the directors, the judges of England have more strictly enforced the limitations of the charters of corporations against outsiders than have those of the United States. *Monument Bank v. Globe Works*, 101 Mass. 57, 58. There is but one case in which an American court has passed on the
229 exact question whether a resolution of a stockholders' meeting made essential by statute to the authority of directors could be presumed by an outsider from the action of the directors in due form. That is the case of *Connecticut Mutual Life Ins. Co. v. Cleveland, etc.*, R. R. Co., 41 Barb. 9. It presented the same facts as those in *Zabriskie* against the same defendant, reported in 23 Howard at page 400. Bonds had been guaranteed by the directors without the authority required from the shareholders. The Supreme Court of the United States in its decision did not discuss the presumption that a purchaser of bonds might have indulged in respect to such a meeting from the mere act of the directors, but preferred to base its opinion on the subsequent ratification *in pais* by the stockholders. The supreme court of New York, however, put its conclusion on the former ground, saying:

"It is not necessary to inquire or decide whether acts of the defendant were authorized or ratified by a vote of the stockholders in accordance with the provisos of the said sections of the Ohio general statutes, if the defendant had the general power to make the guaranties; for these provisos were intended for the protection of the shareholders and relate rather to the mode or manner of the execution of the power; and the plaintiff had a right to presume that the defendant had done its duty and had proceeded regularly in the execution of the power."

And citing among other cases *The Royal British Bank v. Turquand*.

The authority of *Royal British Bank v. Turquand* has been invoked in many cases in this country involving the same principle

but not the same facts. In *Commissioners of Knox County, Indiana, v. Aspinwall*, 21 How. 539, bonds issued by the county commissioners in payment of a railroad stock subscription and reciting a compliance with the statute were held good in the hands of *bona fide* purchasers, although the statutory condition of approval by popular election had not been fully complied with. It was said that the purchaser was not obliged to look beyond the assurance of the face of the bond for evidence of compliance with the necessary conditions. In support of this ruling *Bank v. Turquand* was cited, its facts stated and the judgment of Chief Justice Jervis quoted. Mr. Justice Nelson closed his reference to the case with the remark: "The principle we think sound and is entirely applicable to the question before us." Since this decision in the Aspinwall case the municipal bond cases in the Supreme Court have been legion, and distinctions have been drawn which were possibly not in the mind of the court at that time. It now appears to be settled that in such cases the city or county cannot be estopped to show irregularities in the issuance of the bonds unless there are express recitals of full compliance with statutory requirements, signed by an officer who has the implied or express authority by virtue of the statute to pass upon the question of compliance and to speak for the public corporation or quasi corporation issuing the same. See *Mercer County v. Provident Life & Trust Company*, 72 Fed. Rep. 623, 629, a decision of this court. The truth is that public policy requires a much stricter rule in favor of the debtor in respect of the liability of public municipal corporations on commercial paper than in the case of private corporations. Potter on Corporations, section 549. In the case of private corporations, 230 we do not understand that there is any necessity for recitals of due compliance on the face of their deeds, bonds and notes. The fact of issue in proper form is an implied representation of the fulfillment of preliminary conditions. Lord Campbell referred to the issuance of the bond in the *Turquand* case as a representation by the directors that the necessary meeting had been held. 5 E. & B. 248, 260. The facts in the Aspinwall case and the distinctions subsequently made between public and private corporate bonds perhaps prevent it from being an authority in the case at bar, but the emphatic approval of the *Turquand* case is useful as showing that it is concurred in by the tribunal whose views are controlling with us. The *Turquand* case is also referred to by the Supreme Court as authority in *Merchants' Bank v. State Bank*, 10 Wall. 604, 645.

We may also cite a few cases in the State courts in which *Bank v. Turquand* has been followed. In *Hackensack Water Co. v. De-kay*, 36 N. J. Eq. 548, a water company had no power to organize as such until \$20,000 of its \$100,000 of stock had been paid in, and no power to issue bonds and a mortgage in excess of two-thirds of the paid-in stock. It organized in spite of the limitations when only \$2,000 was paid in and its directors at once ordered the execution of the bonds and mortgage under the name and seal of the corporation to the amount of \$66,500. The mortgage and bonds

were duly executed and sold. It was held by the court of errors and appeals of New Jersey that the purchasers were entitled to presume from an inspection of the charter and the due and formal execution of the bonds and mortgage that all the stock had been paid in, that being a fact concerning the indoor management of the company which an outsider had no means of learning from any public record. *Bank v. Turquand* was relied upon as the chief authority to sustain this conclusion. A similar conclusion on similar facts was reached in *Manufacturing Co. v. Canney*, 54 N. H. 295. In *Miller v. Insurance Company*, 92 Tenn. 167, a company was organized to insure against accidents in traveling. By a subsequent act such companies were given authority, if the amendment was accepted by a vote of the stockholders, to issue policies of insurance against accidents from any cause or from death by disease. Without action by the stockholders, policies were issued by the directors covering the additional risks. It was held by the supreme court of Tennessee, Chief Justice Lurton delivering the opinion, that, on the authority of *Bank v. Turquand* the policy-holder had the right to presume, from the act of the directors, that the new amendment had been accepted by the stockholders. In *Miners' Ditch Company v. Zellerbach*, 37 Cal. 543, the action was by a ditch company to recover back all its property conveyed by deed of its trustees, from one to whom it had come by mesne conveyance. The ground urged was that such a deed was *ultra vires* and was not authorized by a resolution of the board of trustees. The court held, Sawyer, chief justice, delivering the opinion, that inasmuch as the deed might have been *intra vires*, the innocent purchaser was entitled to presume that it was; and, second, that from the seal and the signatures of the trustees he was entitled to presume that it was executed by order of a resolution of the board. The opinion of Chief Justice

231 Sawyer is a very full discussion of the doctrine of *ultra vires*, of the different senses in which the term is used and of the extent to which its application may be affected by knowledge of the party dealing with the corporation and by presumptions of regularity.

From the principles established by the authorities quoted, we have no doubt in this case that *bona fide* purchasers of the Beattyville bonds with the guaranty of the New Albany Company indorsed thereon without notice of its defects were entitled to presume from the face of the guaranty under the name and the corporate seal of the company, and the signatures of the president and secretary, that it was executed by direction of the board of directors, as it in fact was, that they had acted with due authority received from the stockholders by petition as required and that the company cannot now show the fact to have been otherwise.

With respect to two appellants only, the question of notice arises. These are the Louisville Banking Company and the Kentucky National bank. The former claims to be the *bona fide* purchaser of 55 bonds without notice of any defect in the guaranty. With respect to ten of the bonds, the evidence fully sustains the claim. With respect to the 45 bonds, the fact appears to be that they were part

of two blocks of bonds received by the banking company as collateral for two loans made by it to the improvement company. The loans were for \$25,000 each and were secured, one by 62 and the other by 63 Beattyville bonds, but the testimony does not show how the forty-five guaranteed bonds were apportioned to the two loans. The loans were made in May, 1890, after the March meeting of the stockholders of the New Albany Company, at which the action of the directors in making the guaranty had been repudiated. Theodore Harris was the president of the Louisville Banking Company and of the Louisville Southern railway. He was in attendance upon the March meeting of the New Albany stockholders to learn what the new management intended to do in respect to the Louisville Southern lease, and made a speech to the stockholders, and he, in effect, admits that he then heard of the repudiation by the stockholders of the Beattyville guaranty as unauthorized. It is not distinctly proven, but the evidence of Mr. Harris seems to indicate that he acted for the bank in making the loans on the 125 Beattyville bonds in May. It is quite clear that at that time he knew that the stockholders of the New Albany Company had not assented to the guaranty. Under these circumstances we think that the bank was affected by his knowledge.

The Distilled Spirits, 11 Wall. 356.

Hoover, assignee, *v. Wise et al.*, 91 U. S. 308, 310.

Hotchkiss & Upton Co. *v. Union Nat. B'k*, 15 C. C. A. 264.

The fact that the non-assent of the stockholders to the guaranty, and their repudiation of the same, were then known to the bank, is shown pretty clearly by the circumstance—that in making the loans no distinction was made between Beattyville bonds indorsed and unindorsed, and no record kept which showed how many of the indorsed bonds were pledged to each loan. The guaranty added very much to the market value of the bonds before its validity was questioned, and if the bank had been ignorant of its repudiation, we may be reasonably sure that it would have noted the difference in its records between the bonds with the guaranty and those
232 without it. The burden to show want of notice and good faith in this matter is on the bank.

Stewart *v. Lansing*, 104 U. S. 505.

Smith *v. Sac County*, 11 Wall. 139.

Lytle *v. Lansing*, 147 U. S. 59.

With respect to forty-five bonds we do not think it has been sustained. Upon these bonds, therefore, the complainant below is entitled to have stamped under the endorsement of the guarantee the words "This guarantee is binding only on the Louisville, New Albany & Chicago Railway Company, a corporation of Kentucky. It is not binding on the Louisville, New Albany & Chicago Railway Company, a corporation of Indiana and Illinois." The complainant is also entitled to an order enjoining suit on these bonds against it as a corporation of Indiana and Illinois. We are able to make the order of partial cancellation of the guaranty, although the

Louisville Banking Company holds only as pledgee, because the pledgor, the improvement company, was a party to the action and to the decree of complete cancellation and has not appealed therefrom.

The Kentucky National bank holds eighteen bonds. It acquired five as collateral to a loan of \$4,300 made January 9, 1890, to W. W. Jenkins; eight on a loan of \$7,200 to Osborne & Co. January 11, 1890, and five on a loan to Wm. Cornwall for \$3,500. These loans were all made by the bank, acting through its president, J. M. Fetter. Fetter was a director in the New Albany Company and knew that no petition of the stockholders for the guarantee had been filed with the board. Under the rule laid down in the Distilled Spirits case and other cases cited above, the bank must be charged with notice of the defect in the guarantee, so far as the ten bonds received on the Jenkins and Cornwall loans are concerned. It appears however that Fetter was a part owner in the Osborne bonds, and that the loan was in part for his benefit. Under these circumstances we think that the bank cannot be affected with the knowledge of Fetter in that transaction, and it appears that the other directors of the bank had no knowledge of the defect at all.

Innerarity v. Merchants' Nat'l Bank, 139 Mass. 332.

Read v. Doak, 22 U. S. App. 669.

Wilson v. Pauly, 72 Fed. Rep. 129.

The result is that with respect to the bonds received from Wm. Cornwall, Jr., who was a party to the decree below and who has not appealed, the same order of partial cancellation and injunction should be made as that already directed to be made in the case of forty-five bonds held as collateral by the Louisville Banking Company. With respect to the bonds received from Jenkins, the difficulty arises that Jenkins is not a party to this action or the decree below, and we cannot, without giving him the opportunity to show that he was a *bona fide* purchaser, make any order which may affect his rights as pledgor of the bonds. With respect to these bonds, therefore, the order will be to deny all relief and dismiss the bill without prejudice, unless the complainant shall make Jenkins a party, in which case, the question of notice to him and the bank will have to be relitigated. It may turn out that Jenkins

233 had no notice of any defect. If so, then the bank, by taking the bonds as a pledge, is a *bona fide* purchaser, even though it had notice. With the exceptions stated, *i. e.*, in regard to forty-five bonds held by the Louisville Banking Company, and ten bonds held by the Kentucky National bank, the decree of the circuit court is reversed, with directions to dismiss the bill at the cost of complainant.

234 And afterwards, on the same day, to wit, on June 22nd, 1896, the following decrees were filed in said court in said cause; which said decrees are in the words and figures following:

Decrees.

235 United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE TRUST CO.

v.

LOUISVILLE, NEW ALBANY & CHICAGO R. R. Co. } No. 277.

Appeal from the circuit court of the United States for the district of Kentucky.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs and directions to dismiss the bill as to this appellant.

236 United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE BANKING CO.

v.

LOUISVILLE, NEW ALBANY & CHICAGO R. R. Co. } No. 281.

Appeal from the circuit court of the United States for the district of Kentucky.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed at costs of the appellee, with directions to take further proceedings in accordance with the opinion.

237 And afterwards, to wit, on July 7th, 1896, the following order was entered upon the minutes of said court in said cause; which order reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE TRUST COMPANY, Appel-
lant,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO R. R. Co. and Cases to be
Heard on Same Record, Nos. 277
to 295, inclusive.

Nos. 277 to 295. Appeal from
the Circuit Court of the
United States for the Dis-
trict of Kentucky, at Louis-
ville.

And now comes The Louisville, New Albany & Chicago Railway Company, the appellee in the above-entitled causes, by its solicitors,

and moves the court to extend the time to September 1st, 1896, within which said appellee may file its petition herein, and to move thereon to modify the mandate entered in the above causes, and also to file its petition for rehearing herein.

And upon consideration thereof it is ordered that said time for filing said petition and entering said motion for the modification of said mandate and for filing a petition for rehearing be, and the same is hereby, extended to the said first day of September, 1896.

And afterwards, to wit, on August 31st, 1896, a petition for rehearing was filed in said court in said cause; which petition reads and is in the words and figures following:

Petition for Rehearing.

238 In the United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE TRUST COMPANY <i>et al.</i> , Appellants,	}
<i>vs.</i>	
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY, Ap- pellee.	

Petition for rehearing.

Now comes the Louisville, New Albany & Chicago Railway Company, by counsel, and moves the court for a rehearing upon the following grounds:

This court holds:

1. That the act of April 8, 1880, created a corporation in Kentucky which became in fact a corporate citizen of Indiana and not of Kentucky, but nevertheless had its powers conferred exclusively by the Kentucky act.

2. That thereupon the stockholders, directors and officers of the Indiana incorporator of this Kentucky corporation became its stockholders, directors and officers, so that when directors and officers were elected by Indiana stock under and subject to the restrictions and limitations of Indiana law they became likewise directors and officers of the Kentucky company and as such were wholly

239 relieved from Indiana statutory restraints and limitations in their exercise of any additional or new powers conferred by the Kentucky act, and that such adoption of the Indiana corporate agencies of the New Albany by the Kentucky act occurred although the same was not mentioned therein.

3. That there were two distinct corporations of the same name, one in Kentucky and one in Indiana; that the one in the latter State is complainant in this suit; that the Kentucky corporation was authorized under Kentucky law to execute the contract for the purchase of the stock and to guarantee the bonds in payment therefor under the Kentucky amendment of 1882, and such Kentucky company was liable under this guaranty *quoad hoc* its corporate

property in Kentucky, notwithstanding this Kentucky company was not a party to this suit.

4. That the guaranty written on the bonds in question signed with the name of the Louisville, New Albany & Chicago Railway Company, by William Dowd, president, and attested by John A. Hilton, secretary, is the obligation of both the Indiana and Kentucky corporations.

5. That the guaranty in question, although a general engagement, obligates the property of the Kentucky corporation as well as the property of the Indiana corporation for the payment of all bonds so endorsed in the hands of innocent purchasers.

6. That the directors of the Indiana corporation had no authority whatever to endorse the guaranty in question upon any of the Beattyville bonds; but the actual endorsement thereon by direction of the directors bound the stockholders without their knowledge or consent, notwithstanding their prompt repudiation of both contract and guaranty.

7. That the Kentucky company became a part of and entered into the consolidation of the Indiana and Illinois corporations without it appearing in the articles of consolidation that the Kentucky company was a party thereto, by name or reference, said articles being executed by the New Albany Company as an Indiana corporation and not as a Kentucky corporation.

8. That the amendment to the Kentucky act was a recognition not only of the consolidation, but that the Kentucky company was a party thereto, although such consolidation is not mentioned in such amendment expressly or by implication.

9. That this amendment was accepted by acts *in pais*.

10. That the Indiana statute authorized the Indiana New Albany to incorporate itself in Kentucky and to enter into a charter contract in that State.

11. That the company created by the consolidation of Indiana and Illinois corporations might accept the Kentucky amendment or act under the Indiana statute of 1883, touching the contract for the purchase of Beattyville stock and guaranty of its bonds without Illinois authority and without the knowledge or consent of the Illinois and Indiana stockholders.

12. That the directors of the consolidated Indiana and Illinois companies were authorized to bind this consolidated company by a general debt under this statute, without the knowledge, consent or action of the stockholders, and without acceptance of this domestic act by all the stockholders.

13. That the contract for the purchase of stock was valid under this statute of 1883, although the guaranty under that act was expressly limited to a guaranty for another contract which did not or could not include or comprehend the purchase of the Beattyville stock.

14. That the Indiana company, notwithstanding the consolidation, was a separate corporate entity in Indiana, and was therefore as such authorized to execute the contract in question, although its Indiana stock was limited to \$3,000,000, and the contract for guar-

anty was an entirety, and provided for a guaranty of \$2,225,000 of the Beattyville bonds, and said guaranty in that amount was expressly prohibited by the Indiana statute.

15. That this court holds that under general corporate power the directors were authorized to aid or benefit the business of the New Albany Company, through the purchase of Beattyville stock, but under the stock limit to \$3,000,000, and under this contract for the purchase of the stock the New Albany would be unable to acquire a majority of the Beattyville stock, without which it would be unable to control the operation of the Beattyville road for its benefit.

16. That the court holds in effect that there is no difference between general and special powers, or between general and special corporate agents, and their respective authority as such, that the public may presume from the mere act of a special agent without recital or representation of corporate agency that he had the necessary power to make the special contract, notwithstanding the statute prohibited the execution of such contract except in the manner expressly provided in the statute.

242 17. That where a special power is vested by statute for exercise in a designated body the public may presume that the same has been exercised by such body from the mere act of some other body, or from the mere manual signature of an executive officer of the corporation.

18. That the mere act of the stockholders in electing directors clothed the directors with an appearance of authority to exercise special powers in addition to the general corporate powers, notwithstanding the legislature vested the exercise of such special power exclusively and directly in the stockholders.

19. That notwithstanding the question as to whether the Beattyville bonds were within the Indiana statute for guaranty had been expressly committed by the Indiana legislature to the stockholders for decision, persons purchasing the Beattyville bonds with the guaranty endorsed thereon might presume that that question had been determined by the stockholders even though such bonds were not within the Indiana statute.

20. That the stockholders did promptly determine this question at first notice, which this court wholly disregards.

21. The court holds that a statute expressly vesting a special power in the stockholders for exercise is a mere regulation between the members, the same as certain recitals in the articles of incorporation or provisions in by-laws, and that the public may presume from a mere act of an executive officer of the corporation that the stockholders have acted.

22. That the public may indulge a presumption which becomes a substitute for statutory special authority to the agent, and that this presumption arises in the absence of the receipt of the
243 consideration by the corporation and in the absence of recitals or representations sufficient to create or feed an estoppel.

We most respectfully submit that the conclusions of this court

and the grounds upon which they proceed, as stated and set forth in its opinion, do not apply to the statutes and powers here involved; that the gravity and importance of the controlling questions that arise upon this record, some of which are novel and affect great corporate interests in the United States, should be certified to the Supreme Court, that the decision thereof may become binding upon all circuit courts of appeal, which may be done by granting a rehearing herein; that this is especially true when it appears that, after elaborate argument and reargument of the controlling questions here involved before Mr. Justice Brewer and Judge Jackson (afterwards Mr. Justice Jackson), sitting in this case May 27, 1890, at Louisville, they sustained our contention, maintained the jurisdiction of the court upon the ground that the New Albany was not a Kentucky corporation, and granted the injunction, or refused to dissolve it, upon the ground that the same was not the guaranty of the New Albany Company, and it was not liable thereon, and that the Kentucky act of 1880, was a mere license or enabling act. That the conclusion then reached by these two eminent jurists was adopted by Judges Lurton and Barr, who sat together at the hearing of the demurrer to the supplemental bill, and was afterwards fully sustained by Judge Barr on final hearing, so that in Judge Barr's opinion appearing in this record, which is overruled by this court, he reflected the opinion of four Federal judges, including himself, two of the Supreme Court, and one the circuit judge of this court. With the judicial support of these four judges to our contention, we submit this petition and argument in its support with entire confidence.

(NOTE BY CLERK.—At the end of the printed argument, which followed the foregoing petition for rehearing, both under the same cover, appear the names of G. W. Kretzinger, E. Field, James S. Pirtle, for petitioners, which was omitted by stipulation.)

244 And afterwards, to wit, on the same day—that is, on August 31st, 1896—a petition for modification was filed in said court in said cause; which said *motion* reads and is in the words and figures following:

Petition for Modification, etc.

245 In the United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE TRUST COMPANY <i>et al.</i> , Appellants,	}
<i>vs.</i>	
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY,	
Appellee.	

Petition for modification of mandate, etc.

Motion to Amend Mandate and Argument in Its Support.

Now comes the Louisville, New Albany and Chicago Railway Company, by its solicitors, and moves this court to so modify its

mandate as made and entered in the above-entitled cause, and in numbers 278 to 295 inclusive, and by such modification permit appellee to apply to the court below for leave to file an amended and supplemental bill upon the remanding of said causes, and that the circuit court may by such modification, be permitted to grant such application, upon the following grounds, to wit:

1st. Said amended and supplemental bill meets and avoids
246 the defenses resting upon new matter alleged and set forth in appellants' answers, not otherwise met or avoided in said original bill.

2d. That said amended and supplemental bill shows that the Louisville, New Albany and Chicago Railway Company was and is a corporation created by the consolidation of Indiana and Illinois corporations, and that it had corporate power under the laws of said two States to make the guaranty here involved and as not otherwise shown in said original bill.

3rd. That it is shown by way of supplement that after the filing of the original bill herein, the holders of all the outstanding Beattyville bonds, including those having such guaranty endorsed thereon, declared the maturity thereof, under and by virtue of an agreement between the Beattyville Company and the trustee of the mortgage securing said bonds, said agreement being contained in said mortgage without the consent or knowledge of the Louisville, New Albany and Chicago Railway Company, and pursuant thereto and in proceedings to foreclose said mortgage the court adjudged that thereby said bonds matured on the 17th day of November, 1891, instead of on the first day of July, 1919, said last date being the date fixed for their maturity according to the tenor of said bonds upon which said guaranty was endorsed, whereby, and by reason whereof, and without the consent of the guarantor, the terms and tenor of said bonds and the liability of the guarantor thereon, became changed and varied, which in law and equity operated to discharge said guaranty and release the guarantor from all liability thereon, and that said supplemental matter does not appear in the original bill or in any subsequent amendment thereto, as appears from the record thereof.

247 4th. That appellee herewith submits to this honorable court said amended and supplemental bill as proposed, for inspection, which will render unnecessary further repetition of other and additional grounds for relief from such guaranty as therein stated and set forth.

(NOTE BY CLERK.—At the end of the printed argument, which followed the foregoing petition for modification of the mandate, both under the same cover, appear the names of G. W. Kretzinger, E. C. Field, James S. Pirtle, solicitors for complainant, which *was* omitted by stipulation.)

248 And afterwards, to wit, on August 31st, 1896, the following amended and supplemental bill was filed in said court in said cause, which reads and is as follows:

Amended and Supplemental Bill.

249 UNITED STATES OF AMERICA, }
 District of Kentucky. }

Circuit Court of the United States, District of Kentucky.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY	} In Chancery
COMPANY	
vs.	
OHIO VALLEY IMPROVEMENT AND CONTRACT COM-	}
PANY <i>et al.</i>	

Amended and supplemental bill of complaint.

To the honorable judges of the circuit court of the United States for the district of Kentucky, in chancery sitting:

Your orator, The Louisville, New Albany and Chicago Railway Company, by leave of the court first had and obtained, files this its amended and supplemental bill of complaint against the Richmond, Nicholasville, Irvine and Beattyville Railroad Company, the Ohio Valley Improvement and Contract Company, the Louisville Trust Company, the Kentucky National bank, and the Louisville Banking Company, all of which are and were at the date of the commencement of this suit corporations organized and existing under the laws of the State of Kentucky, and citizens of such State; Theodore Harris, Bernard Hollman, W. H. Dillingham, J. H. Leathers, M. A. Huston, Ben. C. Weaver, R. L. Whitney, R. Whitney, A. Schwabacker, S. A. Cannon, Burton A. Duerson, W. M. Charlton, J. A. Shuttleworth, A. J. Ross, John T. Bate, Jr., and W. C. Nones, all of whom are and were at the commencement of this suit citizens of the State of Kentucky.

That your orator, The Louisville, New Albany & Chicago Railway Company, was incorporated and organized under articles of association of date, December 31, 1872, which were duly filed and appear of record in the office of the secretary of state of said State of Indiana, as the law requires, a copy of which articles of association are herewith filed, marked Exhibit A, and made a part hereof for reference; that by virtue of said articles of association and the laws of Indiana, orator was authorized to purchase at a foreclosure sale and operate, the line of railroad in said State of Indiana, described therein; that by said articles the stock issue of orator was fixed and limited at \$3,000,000, divided into shares of \$100 each; that said stock was issued and delivered as full paid and non-assessable in full payment for the railroad franchises and properties in said articles of association described and conveyed by virtue thereof to orator.

That of date April 8, 1880, the Kentucky legislature passed a private act entitled "An act to incorporate the Louisville, New Albany and Chicago Railway Company;" that the first section of

said act recites that the Louisville, New Albany and Chicago Railway Company, a "corporation organized under the laws of Indiana is hereby constituted a corporation," etc.; that the authority therein conferred was limited to the acquirement of terminal facilities in the city of Louisville and county of Jefferson, Kentucky; that it made no provision for stock, stockholders or directors, and orator avers that it was a mere enabling act limited to the acquirement of terminal facilities by orator as an Indiana corporation in Louisville for the operation of its Indiana road thereto for the receipt and delivery of interstate traffic; that orator by its funds and credit acquired and paid for said terminal facilities in Louisville, and fully equipped the same for use as the Louisville terminals of
251 orator's Indiana road, and that the same belong in law and in equity to orator, and are now and always have been used for that purpose.

That in the month of January, 1880, a corporation called the Chicago, Indianapolis and Air Line Railroad Company, hereafter called the air line company, was incorporated and organized under Indiana law to build and operate a line of railroad from Indianapolis, Indiana, to the Illinois State line, and about the same date a corporation called the Chicago and Dyer Railroad Company, hereafter called the Dyer Company, was incorporated and organized under Illinois law to construct and operate a railroad from Chicago to the Indiana State line; that shortly thereafter said air line and Dyer companies executed articles of agreement of consolidation under the name and style of The Chicago & Indianapolis Air Line Railway Company, a copy thereof is filed herewith and marked "Exhibit C," and made a part hereof for reference; that thereafter said proposed line of railroad from Indianapolis to the Illinois State line was acquired and completed; that of date May 5th, 1881, said air line and Dyer companies by the name and style of the Chicago, Indianapolis & Air Line Railroad Company signed articles of consolidation of their Illinois and Indiana franchises, etc., with the Indiana franchises of orator, a copy of which articles appears in the record of this cause (p. 42), to which reference is here made; that the stock of the constituent companies was surrendered and new stock of the consolidated Indiana and Illinois company was issued in exchange therefor as in said articles provided; that the corporation therein created was to be called and has since been known as
the Louisville, New Albany & Chicago Railway Company;
252 that by virtue of said articles of consolidation the business and affairs of the constituents were to be managed by a board of directors to be annually elected according to law at such date and at such place as fixed by the by-laws of the consolidated corporation, and until the first election of such board the directors of the consolidated corporation were to be and were in fact composed of the then Indiana board of directors of orator; that pursuant thereto and of date August 9th, 1881, the following resolution was passed at a meeting of the board of directors of the consolidated company, in the words and figures following to wit:

"Whereupon, on motion of Mr. Sloan seconded by Mr. Vail, the

following proceedings and resolutions were unanimously adopted and ordered to be spread upon the records, viz:

"It appearing to the satisfaction of the directors that the articles of consolidation between the Louisville, New Albany and Chicago Railway Company of Indiana, and the Chicago and Indianapolis Air Line Railway Company of Indiana and Illinois have been fully and finally approved by the shareholders and directors of the two companies respectively, and the articles of consolidation finally and fully executed and delivered by the respective presidents and secretaries under the corporate seals of the companies, and have been lodged in the proper offices in Indiana and Illinois; and that the consolidation has been and is established, and that those who are present are a majority and quorum of the board of directors of the consolidated corporation, under the terms of the said articles of consolidation, therefore,

"Resolved, That the said action as above recited, be and the same is ratified and approved, and that the said articles of consolidation and the ratification thereof, whereby the present corporation was created, be spread at large upon our minutes."

And thereupon and thereafter there was only one set of executive officers, stockholders, directors, and but one management,
253 each and all of whom acted as stockholders, directors and officers of said consolidated corporation, and not as the stockholders, directors or officers of the constituent Indiana company, or of the constituent Illinois company.

That after the consolidation last aforesaid, to wit: April 7, 1882, the Kentucky legislature passed an act entitled, "An act to amend an act entitled, An act to incorporate the Louisville, New Albany & Chicago Railway Company," approved April 8, 1880, a copy of which is filed herewith, marked "Exhibit D," and made a part hereof for reference.

That the special powers therein conferred to guarantee the bonds of any railroad company in Kentucky, or to lease or consolidate with the roads of the class therein specifically mentioned, were expressly vested in the corporation for exercise, and the same could not be exercised by the directors without authority from the stockholders; that there was no Kentucky company of the name of orator that had either stockholders, directors or executive officers through whom said special powers, or any of them, could be exercised, and that the same could only be exercised by them by express permission, authority and consent of the legislatures of Indiana and Illinois, which was never given. That the Indiana legislature passed an act in 1883, which provided, among other things, as follows:

"3951a. Guarantee of bonds of another company.—The board of directors of any railway company organized under and pursuant to the laws of the State of Indiana, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an endorsement guaranteeing the payment of the principal and interest of the bonds
254 of any railway company organized under or pursuant to the laws of any adjoining State, the construction of whose line

or lines of railway would be beneficial to the business or traffic of railway so indorsing or guaranteeing such bonds.

"3951b. Petition of stockholders.—2. The petition of the stockholders specified in the preceding section of this act shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

"3951c. Limitation of the power.—3. No railway company shall, under the provisions of this act, indorse or guarantee the bonds of any such railway company or companies as is above mentioned to an amount exceeding one-half of the par value of the stock of the railway company so indorsing or guaranteeing, as authorized under this act."

That said Indiana act was special and not general; that it withheld the power to guarantee from all Indiana companies whose lines of railway did not extend across the State, and withheld from the benefit of such guaranty all bonds of all railways in Kentucky, the construction of which would not aid or benefit the traffic of such Indiana company whose line extended across said State, and orator avers that any attempt at guaranty by an Indiana company whose lines did not extend across the State, or a guaranty by it upon any bonds of a Kentucky railway which in its operation would not be beneficial to the business and traffic of such Indiana company, would be without legislative authority and therefore wholly null and void; that the exclusive power to determine what Kentucky railway in its operation would be beneficial to the business and traffic of an Indiana company was vested in the stockholders, and without an affirmative determination thereof by said stockholder evidenced by a petition to the directors to direct a guaranty, any attempted guaranty of the bonds of any Indiana company would be wholly null and void.

That the Richmond, Nicholasville, Irvine & Beattyville Company, hereafter called the Beattyville Company, is a corporation organized under the laws of the State of Kentucky, with corporate authority to build and operate a line of railroad extending from Versailles to Beattyville, wholly in said State; that the shortest distance from orator's southern terminus to the nearest point of the proposed line of railroad of said Beattyville Company was and always has been about 65 miles.

That the Ohio Valley Improvement & Contract Company, hereafter called the contract company, is a corporation organized under the laws of the State of Kentucky, with franchises and authority to build and construct railways; that of date October 11, 1888, said contract company made its written contract with said Beattyville Company, a copy of which appears attached to orator's original bill filed herein marked Exhibit A and the same is here referred to as a part hereof; that therein said contract company agreed with the Beattyville Company to build and equip its line of road and to receive in full payment therefor about \$550,000 of municipal bonds voted to the Beattyville Company and \$25,000 per mile of its first-mortgage bonds, and its full issue of capital stock less about \$550,000

thereof, said bonds and the capital stock of said company to aggregate respectively about \$2,250,000.

That October 5, 1889, a special meeting of the directors of said consolidated New Albany Company was convened in the city of New York, at which were present eight of the thirteen directors of said consolidated New Albany; that at said meeting the following resolution as the same now appears spread at large in the record of the proceedings of said meeting was submitted to said eight persons so convened as the majority of the directors of said consolidated New Albany as aforesaid:

"The president laid before the board a proposal submitted by Mr. A. E. Richards, president of the Ohio Valley Improvement and Contract Company, for transfer to this company of three-fourths of the entire capital stock of the Richmond, Nicholasville, Irvine and Beattyville Railroad Company, for the consideration of the guaranty of the principal and interest of the bonds of the said company by this company, in accordance with the following proposed agreement:

"On motion of Mr. Cook, seconded by Mr. Hitt, it was resolved that the company will guarantee the principal and interest of said bonds on the terms proposed, and that the president, or vice-president and assistant secretary of this company be and they hereby are authorized to execute and deliver said agreement under the seal of the company."

That said resolution was so submitted, considered and adopted in the manner aforesaid without any petition from a majority of the stockholders of said consolidated New Albany as required in said Indiana statute of 1883, and without which said directors had no authority whatever to act in the premises.

That on and about October 9th, 1889, William Dowd, acting as president, and John A. Hilton, acting as assistant secretary of said consolidated New Albany Company of Illinois and Indiana and pretending to act for it signed in its name and on its behalf said contract, wherein and whereby they attempted to bind said Indiana and Illinois New Albany Company, to guarantee the payment of the principal and interest of \$2,225,000 of the mortgage bonds of said Beattyville Company, issued and delivered to said contract company and agreed in and by said contract to accept as consideration therefor three-fourths of the entire capital stock of the Beattyville Company from said contract company, the aggregate issue of which stock was fixed at and limited to \$2,225,000 as aforesaid, a copy of said agreement appearing in the record, at page 2, is by reference thereto made a part hereof.

That some time in the month of December, 1889, certain persons assuming to act as the executive officers of said Indiana and Illinois Consolidated Company under and by virtue of said alleged resolution of the directors of said consolidated company, and by virtue of said agreement with said contract company, placed upon 600 of said Beattyville bonds a guaranty in the following words:

"For value received the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond

the payment by the obligor thereon, of the principal and interest thereof in accordance with the tenor thereof."

That on the day and night of March 11, 1890, said Dowd as president, and said Hilton as assistant secretary and treasurer of said consolidated New Albany, signed the form of guaranty aforesaid upon 585 more of said bonds; that on the next day, to wit:

258 March 12, 1890, the regular meeting of the stockholders of the consolidated New Albany convened for the election of a board of directors for the next ensuing year, and to transact such other business as might come before it. That said eight persons who attempted at said special meeting of said directors to authorize the execution of said agreement with said contract company, for the purchase of said Beattyville stock and the guaranty of said Beattyville bonds as aforesaid, and nearly all of the other directors were voted out of office, and other stockholders of said consolidated New Albany were elected as their successors, and thereupon said stockholders' meeting adjourned until March 22d, 1890, before which date said new directors organized by the election of executive officers, and thereupon said board reported to said adjourned stockholders' meeting said contract of guaranty and its attempted execution by its former executive officers, which was the first knowledge said stockholders had touching or concerning the same, and the first knowledge or notice they had touching the passage of said resolution by said eight persons under which the execution of said contract for said guaranty was attempted; that immediately upon receipt of said notice and knowledge at said adjourned meeting of said stockholders, said contract for the purchase of said Beattyville stock and the attempted guaranty of said Beattyville bonds in consideration thereof, and all guaranties attempted thereunder or pursuant thereto as aforesaid, were wholly repudiated and rejected by resolution adopted by a vote of over 32,000 shares out of 50,000 shares of said consolidated stock, and it was declared that neither said contract or any guaranty attempted thereunder was of any binding force or effect whatever, and by further resolution of said directors and stockholders their executive officers
259 were expressly directed to proceed as they might be advised

by counsel to have said contract for guaranty and said attempted guaranty thereunder canceled and set aside, which constituted a full, final and binding decision by said stockholders that said Beattyville road would not in its construction or operation aid or benefit the traffic or business of orator, and thereupon and pursuant thereto this suit was instituted; that the persons constituting the majority of the board of directors of said consolidated New Albany who passed the resolution aforesaid authorizing the execution of said agreement with said contract company for the purchase of said stock and guaranty as aforesaid, at the time of the passage of said resolution were the owners of not to exceed four hundred shares of said consolidated stock, and that no other directors or holders of said stock had any notice or knowledge thereof prior to the 12th day of March, 1890. That this suit was instituted and the original bill filed herein on the 9th of April, 1890, after the repu-

diation of said contract for guaranty and said guaranties attempted thereunder on the 22nd day of March, 1890, as aforesaid.

Orator denies that said Indiana and Illinois corporation—said consolidated New Albany—had any legislative authority or corporate capacity to make said agreement with said contract company or to execute said guaranty in performance thereof, on its part, and avers that for want of corporate power so to do, said contract and the guaranty of said Beattyville bonds attempted thereunder, are total nullities; and to more fully show the want of requisite corporate capacity and legislative authority to execute said contract and make said guaranty aforesaid, and to meet certain affirmative defenses set up by defendants or some of them in their answers to orator's original bill herein, orator says:

That the defendants, or some of them, give out and allege that they are the holders of some of said Beattyville bonds with said endorsement or guaranty thereon, and said defendants, or some of them, pretend that the same constitutes a valid and binding obligation upon orator, as the guarantor thereof, which orator denies; and to maintain its denial in this behalf, orator shows that said Kentucky act of April 8, 1880, did not constitute an incorporation of orator as a Kentucky corporation, but was only a mere legislative license to authorize it to acquire terminal facilities in the city of Louisville, county of Jefferson and State of Kentucky, and to transact, by the use thereof, interstate business; that before the passage of said act there was no law in force in the State of Kentucky which directly or indirectly prohibited orator from acquiring terminal facilities in the city of Louisville, county of Jefferson, and in transacting thereat its interstate business, and therefore orator avers that without such act it had full authority and right so to do; that orator never at any time, either by vote of its Indiana stockholders or directors, or by any action whatever by its executive officers accepted said Kentucky act as its Kentucky charter. That orator as an Indiana corporation, its executive officers, directors or stockholders, never at any time acted under said Kentucky act as a Kentucky corporation or as stockholders, directors or officers thereof; that said consolidated New Albany, its stockholders or executive officers, never at any time accepted or acted under said Kentucky act as a Kentucky corporation; and orator avers that said New Albany, neither as a corporation of Indiana or as a consolidated corporation of Indiana and Illinois, had no statutory authority whatever to make any charter contract with the State of Kentucky, or as a corporation to become incorporated in said State of Kentucky.

That the defendants, or some of them, pretend that said guaranty was authorized by Kentucky amendment of 1882, which orator denies, and avers that orator as an Indiana corporation neither by any act or conduct on its part or by its executive officers, directors or stockholders on its behalf or in its name ever accepted or acted under said amendment in any manner, matter or thing; and further avers that without express authority from and permission of the legislature of the State of Indiana, and without express author-

ity and consent from its stockholders, orator had no lawful authority by or through its directors or executive officers to embark or hazard its corporate funds or credit by investing the same in another business, to wit, in the purchase of the Beattyville stock, or to construct or to aid in the construction of the Beattyville road, and that all corporate powers vested in orator's board of directors for exercise were expressly limited by Indiana law to the business which orator was incorporated and organized to conduct as the same is defined and described in and restricted by its articles of incorporation and the statutes of Indiana pertaining thereto.

Orator avers that the lease executed by the Louisville Southern to said consolidated New Albany recited in its first preamble that by the terms of an agreement dated the 21st day of June, 1887, between said Southern Company and the Kentucky and Indiana Bridge Company, said Southern Company had an entrance into the city of Louisville to a point of connection with the Short Route Railway Transfer Company, and an extension of its line over the bridge of said bridge company into Indiana to a point of connection with the New Albany road in said State, and that the New Albany Company had constructed, owned and then operated a railroad through Indiana which met and connected as aforesaid with said Louisville Southern railroad at said Indiana line in Indiana. And orator avers that the leasehold granted by said Louisville Southern began at New Albany in Indiana and extended over the bridge across the river under the Louisville Southern's bridge contract with the privilege of its Louisville terminal facilities, etc.; that whatever Louisville terminals may have been acquired by said consolidated New Albany under the Kentucky license or act of 1880 were neither described in, affected or covered by said lease, and that said lease brought the Louisville Southern into the State of Indiana to a connection with orator's road at New Albany, without reference to and without the use of any of said terminal facilities theretofore acquired by it in said city of Louisville, a copy of which is herewith filed as Exhibit "D" for reference.

The authority to guarantee bonds by said Indiana act was expressly limited to the bonds of railways in adjoining States that would be "beneficial to the business or traffic of the" railway so endorsing or guaranteeing such bonds and orator charges that said contract with said contract company for the guaranty of said bonds was not upon or for said statutory consideration, to wit: that the guaranty of said bonds "would be beneficial to the business or traffic" of orator, the guarantor thereof, but for another and different consideration not contemplated in or authorized by said statute, to wit: the purchase of Beattyville stock as aforesaid.

And orator avers that at the date of said attempted guaranty and at the date defendants claim to have purchased said Beattyville bonds no part of said Beattyville road was completed or in operation, and that only a small part thereof was in process of construction and only a part thereof has ever been built.

That said Indiana statute expressly withholds from any Indiana

company authority to endorse or guarantee bonds in an amount exceeding one-half of the par value of its stock; that as heretofore stated and shown, the stock of the Indiana New Albany and the face value of the issue thereof was expressly limited by its articles of incorporation, to \$3,000,000, divided into shares of one hundred dollars each; that said contract for the purchase of said Beattyville stock and for the guarantee of said bonds is an entirety and is for the guaranty of \$2,225,000 face value of bonds, which is \$725,000 in excess, of one-half of the face value of said authorized Indiana stock, and therefore said contract was beyond the lawful authority of the New Albany as an Indiana corporation to execute or perform, and orator denies that the same was ever authorized by the stockholders or directors or that the same was signed by the executive officers of the Indiana New Albany.

That orator further shows that said Indiana statute above quoted embraced and only extends to domestic corporations of the State of Indiana and that the same does not extend to or include interstate companies, formed by the consolidation of Indiana corporations with an Illinois company.

264 That said consolidated New Albany Company could not binds it- consolidated property, railroad franchises or income by said contract or guaranty of said Beattyville bonds attempted thereunder, without express authority so to do from the legislature of both of the States of Indiana and Illinois, and orator avers that there was no law in force in the State of Illinois, which authorized said agreement with said contract company for the purchase of Beattyville stock, or to guarantee the Beattyville bonds thereunder, whether in payment for Beattyville stock or for any other consideration, or upon any other ground whatever, and therefore orator avers that said resolution of said directors of said consolidated company and said agreement with said contract company signed by the executive officers of said consolidated company and said attempted guaranty of said bonds signed by the said executive officers of said consolidated company, and each of them were total nullities, for want of lawful authority to make and execute.

And orator avers that said eight persons so assuming as directors to authorize the execution of said contract and guarantee had full knowledge of all the matters and things aforesaid.

Orator further shows that the Beattyville bonds upon which the guaranty is alleged to have been made bore date July 1, 1889, and were to mature thirty years after the date thereof, to wit: July 1, 1919; that said bonds were secured by a certain mortgage executed by said Beattyville Company, upon its Kentucky road and franchises bearing even date with said bonds; that among other things it was provided in said mortgage, to wit:

265 " If any of the interest coupons secured by this deed of trust shall remain unpaid more than six months after they shall have become due, and shall have been presented, and the payment thereof demanded at the place where they are payable, the principal sum mentioned in each and all of said bonds shall at the option of the holders of a majority of the bonds secured thereby and

then outstanding and unpaid, become forthwith due and payable. Said option shall be exercised by written notice thereof given to said trustee, and shall take effect and cause the principal of said bonds to become due as soon as such notices shall have been served upon the trustee. * * *

"If any of the bonds or coupons shall remain unpaid after the principal shall have become due, either according to their tenor or by default in payment of coupons as hereinbefore provided, it shall be the duty of the trustee upon request thereto in writing made by the holders of a majority of the bonds then outstanding and unpaid" to enforce said security by possession or foreclosure, or both. And orator shows by way of supplement to its bill of complaint herein, that on the second day of December, 1891, the Central Trust Company of New York, as trustee, named in the said Beattyville mortgage, filed its bill of complaint in the circuit court of the United States, for the district of Kentucky, therein alleging among other things, that said Beattyville Company had made such default in payment of its interest upon said bonds that the holders thereof were entitled to and on the 17th day of November, 1891, did give written notice to the said trustee in the manner required therein that they had elected to, and in fact had, exercised their option to have the principal of said bonds to become forthwith due and payable, and pursuant thereto, demanded that said trustee proceed to enforce the security in payment of the principal and interest of said bonds, which was done by the filing of said bill to foreclose as aforesaid.

That orator was not a party to said mortgage or to said bill to foreclose said mortgage, and no guaranty upon said bonds was mentioned therein.

That orator never consented to said change or substitution of date for the maturity of said bonds, and had no knowledge thereof until long thereafter.

That on July 9, 1894, final decree for foreclosure and sale was entered in said cause, wherein the court adjudged that the principal of said bonds had become due and payable by virtue of the exercise of the option by the bondholders, as in said trust deed provided.

That June 9th, 1894, a final decree was entered in said foreclosure suit adjudging that the holders of the bonds had in the exercise of their option made the principal to mature and become payable on November 17, 1891, and thereupon the court decreed that "\$2,334,000 of the principal sum specified in the said mortgage bonds aforesaid, together with interest aforesaid, has now become due and payable," etc.

That said court by said decree further reserved jurisdiction of said cause for the purposes expressed therein, to thereafter render further money judgment in favor of the holder or holders of said bonds for any balance, with principal and interest thereon that might remain unpaid after the application thereto of the full net proceeds from the mortgage sale of said property made applicable by said decree to the payment thereof.

And orator avers that even if said guaranty was valid the
267 endorsement thereof upon said bonds did not make the guarantor a party to said Beattyville mortgage, and that the liability of such guarantor could only be determined and fixed by the face, tenor and effect of said bonds; that the exercise by the holders of said bonds of said option contained in said trust deed as aforesaid, to declare the principal of said bonds due by reason of default in the principal and interest, constituted a waiver on their part of the terms and tenor thereof for maturity on which said guaranty was endorsed, and that the change of the date for the maturity of said bonds from July 1, 1919, to the 17th day of November, 1891, without the knowledge or consent of said guarantor fully released it from all further or any liability whatever upon said guaranty.

Orator further avers that said optional agreement was wholly between the said Beattyville Company, said bondholders and their trustee, and that orator was not a party thereto, and that the exercise of said option by said bondholders, as aforesaid, varied and changed the terms of said bonds upon which said guarantees were endorsed, and that such change operates in law and in equity to relieve the guarantor of all liability thereon, and that the same cannot be enforced in law or in equity against your orator.

Orator further states that there is no provision in or upon any of said bonds upon which said guaranty was endorsed, referring to or in anywise adopting said Beattyville mortgage, or any of the covenants or provisions therein contained, except a mere reference to said mortgage as a security in the following words:

"To which deed of trust and provisions and conditions thereof reference is hereby made."

268 Orator avers that if said reference to said mortgage makes said mortgage or deed of trust a part of said bond the two become one contract, or a part of said guaranty, so as to extend said guaranty thereto, or so as to bind the guarantor by any of its terms or provisions, or by the exercise of said option by the holders of said bonds, then and thereby the negotiability of said bonds, as well as of the guaranty endorsed thereon is destroyed, and the purchasers thereof took the same subject to all defences in law or equity that the maker of said bond or the guarantor thereon may have.

Orator further shows that soon following the judgment of reversal by the United States circuit court of appeals of the decree of this court entered upon the original bill of complaint herein, in and by which said decree the said contract and guaranty were adjudged to be null and void, certain holders of the said Beattyville bonds brought suit in the city of Louisville against orator as an Indiana corporation, alleging in their said complaints filed therein against orator that the said Beattyville Company had failed and refused to pay the interest due and maturing upon the said bonds from and since July 6, 1891; that the payment of the said interest was demanded of the said Beattyville Company on the days when the same became due, but the said company had no funds with which to pay the same; that by reason of the default in the payment of

the said interest, and pursuant to the conditions contained in the said trust deed securing the same, the holders of the majority of the said bonds secured by said trust deed elected to have and declare the principal of all of the said bonds due and payable, and thereupon prayed for judgment against orator for the entire principal and interest accruing upon the said bonds from the beginning.

269 Orator claims, and will insist that the paper written and dated October 9, 1889, and each of the 1,185 pretended signed and sealed instruments, in the name of orator upon said Beattyville bonds are illegal and void documents, which upon their face may purport to bind orator, but are in fact no legal obligations whatever, and that none of the defendants have any right to hold, dispose of or transfer such pretended obligations of orator, but each and every of the defendants should be perpetually enjoined from claiming or enforcing any liability by reason thereof against orator, or from enforcing or attempting to enforce in any court any liability by reason thereof against orator or its property; that orator has tendered back to said improvement company all the shares of Beattyville stock received by orator's officers from it, and said stock has been delivered to the clerk of this court for the purpose of making good said tender.

Orator avers upon information and belief, and charges the truth to be that many of said bonds are in possession of persons whose names are unknown to orator, but when their names and alleged ownership of said bonds or any of them become known to orator, it will, by leave of the court first had and obtained, make them parties defendant hereto by apt words, and claim the relief against them hereinafter prayed.

Forasmuch as orator has for such grievances no adequate remedy at law, but can only obtain relief in equity, it files this amended and supplemental bill, and the premises considered, prays that the defendants heretofore named and summoned, and now parties defendant to the original bill of complaint, and amendments thereto,

to wit: the said The Ohio Valley Improvement and Contract
270 Company, Louisville Trust Company, Kentucky National Bank, W. C. Nones, B. Hollman, Louisville Banking Company, Theodore Harris, Benj. C. Weaver, Jr., James A. Shuttleworth, John H. Leathers, John T. Bate, Jr., M. A. Huston, A. J. Ross, W. M. Charlton, B. A. Duerson, Ronald Whitney, R. L. Whitney, S. A. Cannon, W. H. Dillingham and Abraham Schwabacher be required pursuant to the practice of this court, to answer this amended and supplemental bill of orator, but not under oath, and be compelled to stand to and abide by such orders and decrees as the court may from time to time enter in this cause, and that the injunction heretofore issued in this cause be revived and held against said defendants and each of them until the final hearing hereof; that on final hearing the court will decree the said paper-writing dated October 9th, 1889, and purporting to bind your orator to endorse all of the first-mortgage bonds of the said Beattyville Railroad Company, and each of the 1,185 pretended endorsements so as aforesaid actually placed on such bonds to be illegal and wholly void and that the same and

every thereof, not heretofore cancelled, voluntarily or pursuant to some order of this court not appealed from, shall be delivered up to be cancelled and forever destroyed, and each and every of the defendants hereto and that may hereafter be brought in and made parties defendant hereto personally enjoined from claiming any rights hereunder, and from selling, transferring or encumbering or parting with the possession of any of said Beattyville bonds bearing thereon such pretended endorsement of orator, and enjoined from bringing any suit thereon until such time as the court may order each and all of such bonds having such endorsement to be deposited in the registry of the court to await the enrollment of final decree cancelling all such illegal and void endorsements by orator, and that the court will grant such other and further relief as may seem just and necessary to fully establish and protect the equities of your orator.

LOUISVILLE, NEW ALBANY & CHICAGO
RAILWAY COMPANY,

By G. W. KRETZINGER,

E. C. FIELD,

JAMES S. PIRTLE, *Solicitors.*

UNITED STATES OF AMERICA, }
District of Kentucky. }

Circuit Court of the United States for said District.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY }
vs.
OHIO VALLEY IMPROVEMENT & CONTRACT COMPANY *et al.* }

STATE OF ILLINOIS, } ss:
County of Cook, }

— — —, on oath states that he is connected with the law department of the Louisville, New Albany & Chicago Railway Company, and as such is authorized to make this affidavit; that he has read the foregoing bill and knows the contents thereof, and that the matters therein stated and set forth are true, as he verily believes.

Subscribed and sworn to before me on this — day of —, 1896.

272 And afterwards, to wit, on October 5th, 1896, the following order was filed in said court in said causes; which order reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE TRUST COMPANY

vs.

LOUISVILLE, NEW ALBANY & CHICAGO R. R. Co. and Cases Heard on Same Record, Being Nos. 278 to 295, Inclusive.

No. 277. Appeals from the Circuit Court of the United States for the District of Kentucky, at Louisville.

The petition for rehearing and also the petition to modify the mandate, etc., filed in the above-entitled causes are hereby denied by order of the court.

And afterwards, to wit, on October 15, 1896, a stipulation was filed in said court in said causes; which stipulation reads and is in the words and figures following:

273 United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE TRUST COMPANY *et al.*, Appellants,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, Appellee.

F. O. Loveland, clerk.

SIR: In making a transcript of the record herein to be used by appellee upon motions in the Supreme Court of the United States for writs of certiorari herein you will follow the directions contained in the stipulation of parties this day filed in your office. The transcript under the above-named directions will include:

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all the orders in the United States circuit court of appeals, sixth circuit, the opinion of the court of appeals, motion of appellee for rehearing, petition of appellee to modify mandate, omitting the argument in its report, proposed amended bill offered by appellee.

275 This præcipe and stipulation of counsel filed in office.

JAMES S. PIRTLE, *For Appellee.*

ST. JOHN BOYLE, *Attorney.*

NOBLE & SHERLEY,

BARNETT, MILLER & BARNETT,

For Louisville Banking Co.

ALEXANDER P. HUMPHREY,

GEO. M. DAVIE, *For Ky. Nat. Bank.*

Endorsed on back: United States circuit court of appeals, sixth circuit. Louisville Trust Co. *et al.*, appellants, *vs.* Louisville, New Albany & Chicago Railway Company, appellee. Stipulation. Filed October 15, 1896. Frank O. Loveland, clerk.

276 And afterwards, on the same day, to wit, on October 15, 1896, a stipulation was filed in said court in said causes; which stipulation is in the words and figures following:

277 United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE TRUST COMPANY *et al.*, Appellants,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, Appellee.

} Stipulation.

It is agreed between the appellants and the appellee herein that the said appellee may take the record in the case of The Louisville Trust Company against the appellee and the record in the case of Louisville Banking Company against the appellee, omitting all matter referring exclusively to the cases of the other appellants in this record, in making up the record for the application by appellee to the Supreme Court of the United States for a writ of certiorari; and

It is further agreed that the determination of the motion for certiorari in said two cases shall control in all the other cases not specially named, and if the Supreme Court of the United States shall cause the writ to issue the affirming or reversing by the Su-

preme Court of the United States of the judgment of the circuit court of appeals in the sixth circuit in the said two specially named cases shall have the same effect as if all the said cases not specifically named had been removed by writ of certiorari to the Supreme Court of the United States and by said court affirmed or reversed, and the same order of affirmation or reversal shall be entered in all the cases, as well as those specially named as those not specially named.

It is further stipulated by the appellants and appellee that in making up the record herein for the purpose of said motions for writs of certiorari as aforesaid the clerk of the court shall omit from the record the answers of all the appellants except the two above specially named and their several proceedings for an appeal
278 taken in the United States circuit court, district of Kentucky.

It is further stipulated and agreed that the said motions in the Supreme Court of the United States and said cases, if the motions should be granted, shall be heard upon the record stipulated as above, for the reason that the pleadings and proceedings in the said two cases of Louisville Trust Company, appellant, and The Louisville Banking Company, appellant, against The Louisville, New Albany & Chicago Railway Company, appellee, present the full issues involved in this record.

ST. JOHN BOYLE, *Attorney.*

NOBLE & SHERLEY,

BARNETT, MILLER & BARNETT,

For Louisville Banking Co.

ALEXANDER POPE HUMPHREY,

GEO. M. DAVIE, *For Ky. Nat. Bank.*

JAMES S. PIRTLE,

For Appellee.

(Endorsed on back :) United States circuit court of appeals, sixth circuit. Louisville Trust Company *et al.*, appellants, *vs.* Louisville, New Albany & Chicago R'y Co., appellee. Agreement. Filed October 15, 1896. Frank O. Loveland, clerk.

279 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the parts of the record mentioned in a stipulation filed in the clerk's office October 15, 1896, relative to the preparation of transcript of the record in the case of The Louisville Trust Company *v.* Louisville, New Albany & Chicago Railroad Company and The Louisville Banking Company and seventeen other appeals against the same appellee, numbered 277 to 295, inclusive, of the October term, 1895, as the same remains upon the files and records of the said United States circuit court of appeals for the sixth circuit and of the whole thereof.

Seal United States Circuit
Court of Appeals, Sixth
Circuit.

In testimony whereof I hereunto sub-
scribe my name and affix the seal of said
United States circuit court of appeals for
the sixth circuit, at the city of Cincin-
nati, Ohio, this seventeenth day of Octo-
ber, 1896.

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.*

280 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the
judges of the United States circuit court of appeals for the sixth
circuit, Greeting:

Being informed that there is now pending before you a suit in
which The Louisville Trust Company is appellant and The Louis-
ville, New Albany & Chicago Railway Company is appellee, which
suit was removed into the said circuit court of appeals by virtue of
an appeal from the circuit court of the United States for the district
of Kentucky, and we, being willing for certain reasons that the said
cause and the record and proceedings therein should be certified by
the said circuit court of appeals and removed into the Supreme

281 Court of the United States, do hereby command you that you
send without delay to the said Supreme Court as aforesaid
the record and proceedings in said cause, so that the said Supreme
Court may act thereon as of right and according to law ought to be
done.

Witness the Honorable Melville W. Fuller, Chief Justice of the
United States, the 18th day of November, in the year of our Lord
one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit,

I hereby make return of this writ pursuant to a stipulation of
counsel filed this 24th day of November, 1896, which is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE BANKING COMPANY, Appellant,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY, Appellee,

and

LOUISVILLE TRUST COMPANY, Appellant,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY, Appellee.

} Stipulation.

It is hereby stipulated by counsel for the appellants and appellee

that the record filed in the Supreme Court of the United States, with the petition for certiorari, in the above-entitled causes may be taken as a return by the clerk of the circuit court of appeals to the writs of certiorari in the said causes, and that this stipulation or a copy thereof may be returned, with the said writs, to the Supreme Court of the United States as a return to said writs.

Signed this 23rd day of November, 1896.

ST. JOHN BOYLE,
For Lou. Trust Co.
JAMES S. PIRTLE,
Solicitor for Appellee.

BARNETT, MILLER & BARNETT,
SHACKELFORD MILLER,
Solicitors for Lou. Banking Co.

Done at Cincinnati, Ohio, this 24th day of November, 1896.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.*

282 [Endorsed :] 16,424. Supreme Court of the United States.
No. 254. October term, 1897. The Louisville Trust Com-
pany vs. The Louisville, New Albany & Chicago R'y Co. Writ of
certiorari and return. Filed Nov. 27, 1896.

283 UNITED STATES OF AMERICA, ss :

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting :

Being informed that there is now pending before you a suit in which The Louisville Banking Company is appellant and The Louisville, New Albany & Chicago Railway Company is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the district of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme

284 Court of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of November, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit,

I hereby make return of this writ pursuant to a stipulation of counsel filed this 24th day of November, 1896, which is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

LOUISVILLE BANKING COMPANY, Appellant,	}	Stipulation.
<i>vs.</i>		
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY		
COMPANY, Appellee,		
and		
LOUISVILLE TRUST COMPANY, Appellant,		
<i>vs.</i>		
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY		
COMPANY, Appellee.		

It is hereby stipulated by counsel for the appellants and appellee that the record filed in the Supreme Court of the United States, with the petition for certiorari, in the above-entitled causes may be taken as a return by the clerk of the circuit court of appeals to the writs of certiorari in the said causes, and that this stipulation or a copy thereof may be returned with the said writs to the Supreme Court of the United States as a return to said writs.

Signed this 23rd day of November, 1896.

ST. JOHN BOYLE,

For Lou. Trust Co.

JAMES S. PIRTLE,

Solicitor for Appellee.

BARNETT, MILLER & BARNETT,

SHACKELFORD MILLER,

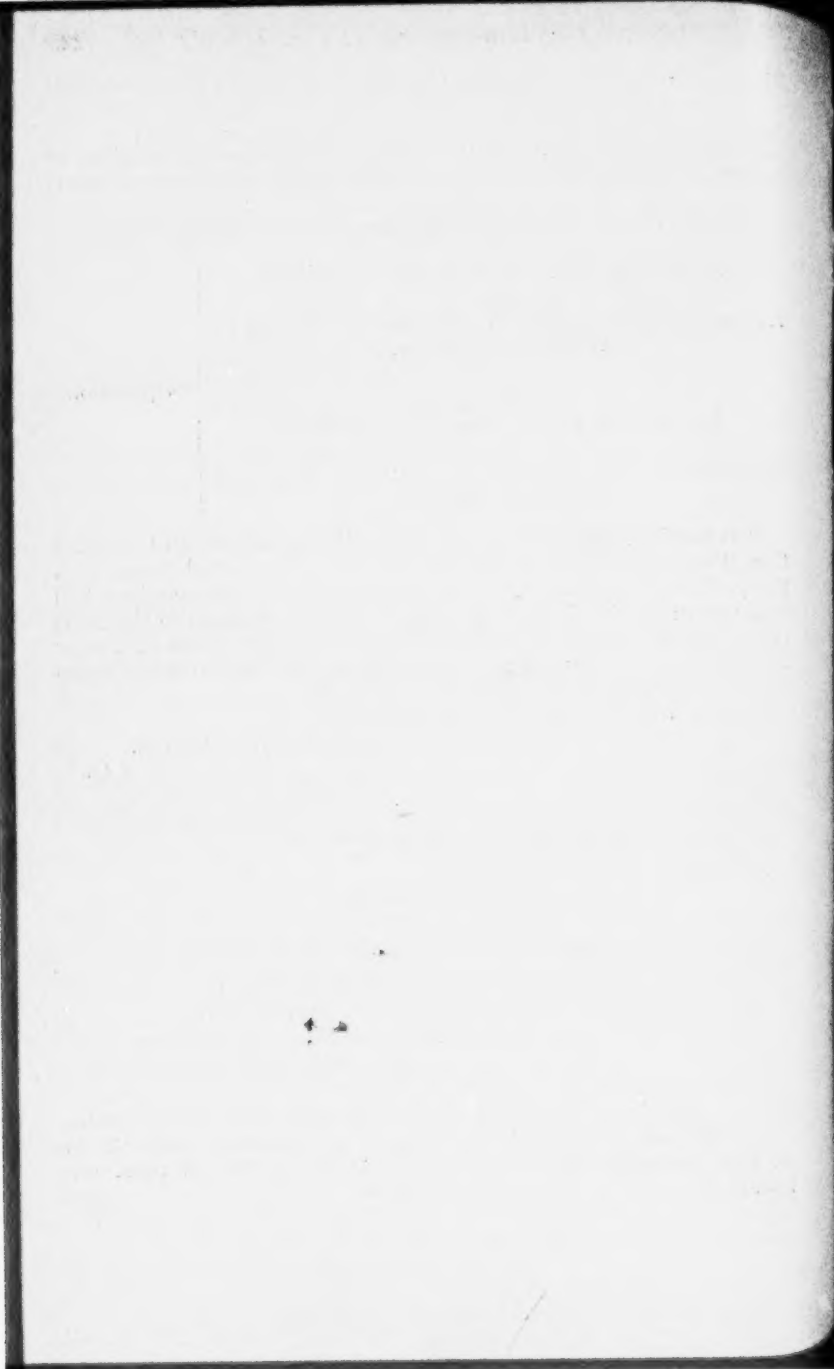
Solicitors for Lou. Banking Co.

Done at Cincinnati, Ohio, this 24th day of November, 1896.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.*

285 [Endorsed:] 16,425. Supreme Court of the United States.
No. 255. October term, 1897. The Louisville Banking Co.
vs. The Louisville, New Albany & Chicago R'y Co. Writ of cer-
tiorari and return. Filed Nov. 27, 1896.



NOV 9 1896

JAMES H. MCKENNEY,

CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

THE LOUISVILLE TRUST COMPANY,

Appellants,

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,

Appellee.

THE LOUISVILLE BANKING COMPANY,

Appellants,

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,

Appellee.

**PETITION BY LOUISVILLE, NEW ALBANY
& CHICAGO RAILWAY COMPANY for
Writs of Certiorari to the United States
Circuit Court of Appeals for the Sixth Circuit.**

G. W. KRETZINGER,
E. C. FIELD,
JAMES S. PIRTLE,

For Petitioner.



IN THE
Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

THE LOUISVILLE TRUST COMPANY,
Appellant,
vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,
Appellee.

THE LOUISVILLE BANKING COMPANY,
Appellant,
vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,
Appellee.

**PETITION BY LOUISVILLE, NEW ALBANY
& CHICAGO RAILWAY COMPANY for
Writs of Certiorari to the United States
Circuit Court of Appeals for the Sixth Circuit.**

G. W. KRETZINGER,
E. C. FIELD,
JAMES S. PIRTLE,

For Petitioner.



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IN THE
United States Circuit Court of Appeals
 FOR THE SIXTH CIRCUIT.

OCTOBER TERM, A. D. 1896.

LOUISVILLE TRUST COMPANY	}
<i>Appellant,</i>	
<i>vs.</i>	
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,	}
<i>Appellee.</i>	
THE LOUISVILLE BANKING COMPANY,	}
<i>Appellant,</i>	
<i>vs.</i>	
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,	}
<i>Appellee.</i>	

NOTICE.

And now comes the Louisville, New Albany and Chicago Railway Company, by its counsel, and moves this honorable court to order, by *certiorari* or other process, the Circuit Court of Appeals for the Sixth circuit, or the judges thereof, to certify to this court, for its review and determination, the above entitled causes in said Court of

Appeals lately pending, wherein the Louisville Trust Company *et al.* were appellants, and the Louisville, New Albany and Chicago Railway Company was appellee, and in support of said motion herewith submits its petition and a certified copy of the full record in said cause now in said Circuit Court of Appeals.

GEO. W. KRETZINGER,
JAMES S. PIRTLE and
E. C. FIELD,

*Solicitors for the Louisville, New Albany &
Chicago Railway Company.*

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

LOUISVILLE TRUST
COMPANY

vs.

LOUISVILLE, NEW ALBANY &
CHICAGO RAILWAY COMPANY.

THE LOUISVILLE BANKING
COMPANY

vs.

LOUISVILLE, NEW ALBANY &
CHICAGO RAILWAY COMPANY.

MOTION.

Notice is hereby given that upon the verified petition of the Louisville, New Albany and Chicago Railway Company, appellee in the above entitled causes, and upon all the pleadings and proceedings herein, we shall, on Monday the ninth day of November, 1896, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which is here-

with served upon you) to the Supreme court of the United States at the capitol in the city of Washington, District of Columbia.

GEO. W. KRETZINGER,

E. C. FIELD,

JAMES S. PIRTLE,

*Solicitors for Louisville, New Albany &
Chicago Railway Company, Appellee.*

The foregoing notice is hereby accepted this 12th day of October, 1896, by

ALEXANDER POPE HUMPHREY,

SWAGER, SHERLEY,

GEO. M. DAVIE,

NOBLE & SHERLEY,

For Ky. National Bank.

ST. JOHN BOYLE,

Solicitors for Appellants.

SHACKELFORD MILLER,

BARNETT, MILLER & BARNETT,

For Louisville Banking Co.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

LOUISVILLE TRUST COMPANY,

vs.

Appellant,

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,

Appellee.

THE LOUISVILLE BANKING COMPANY,

vs.

Appellant,

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,

Appellee.

PETITION.

Petition of the Louisville, New Albany & Chicago Railway Company, for a writ of *certiorari*, requiring Circuit Court of Appeals for the Sixth Circuit to certify to the Supreme Court of the United States, for its review and decision, the appeal taken by the Louisville Trust Company *et al.*, against the Louisville, New Albany & Chicago Railway Company.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Louisville, New Albany & Chicago Railway Company respectively avers and shows, to wit:

First. Your petitioner is, and was at the time it brought said suit, a corporation of the States of Indiana and Illinois, and was created and exists as such by virtue of a consolidation of certain Indiana Railway Corporations, with a certain railroad corporation of the State of Illinois, pursuant to the laws of both states.

That the Louisville Trust Company, the Ohio Valley Improvement and Contract Company (hereafter called Contract Company), the Richmond, Nicholasville, Irvine and Beattyville Railroad Company (hereafter called Beattyville Company), the Louisville Safety Vault and Trust Company, defendants to the bill brought by your petitioner, as hereinafter mentioned, are and were at the commencement of said suit, corporations organized and existing under and by virtue of the laws of the State of Kentucky, and are and were corporate citizens of said state; that the natural persons now remaining with them as co-defendants in said suit, are and were at the date of its commencement, citizens of states other than said States of Indiana and Illinois.

Second. This suit was brought by petitioner by bill in chancery in the United States Circuit court, at Louisville, Kentucky, to have adjudged void and cancelled the contract with the Contract Company and the guarantee upon certain of the Beattyville bonds, and for perpetual injunction to restrain suit upon such guaranty upon the ground that petitioner's directors had neither statutory power or authority to direct their execution. (See bill; Rec., 1, and the proposed amended bill; Rec., 206.)

The motion for a temporary injunction was resisted and was heard before Associate Justice Brewer and Circuit Judge Jackson (afterwards a member of this court).

Upon full argument the injunction was ordered to issue as prayed in the bill. Thereafter petitioner filed its supplemental bill and thereupon defendants or some of them filed demurrers to the bill and its supplement. These demurrers were heard before Circuit Judge Lurton and District Judge Barr, and were overruled.

The cause as finally heard before the Honorable John W. Barr, District Judge and final decree was rendered adjudging that petitioner had no corporate capacity to make such guaranty, and that the same as endorsed upon said corporate bonds by petitioner's executive officers was void, should be cancelled and suit thereon against petitioner perpetually enjoined.

From this decree an appeal was taken to the United States Circuit Court of Appeals for the Sixth circuit.

Third. The cause on appeal having been heard before Taft, Circuit Judge, and Severens and Hammond, District Judges, the opinion of the court was delivered June 22, 1896, by Taft, Circuit Judge, reversing the decree upon the ground that the contract and guaranty were valid upon the grounds and to the extent hereafter shown (opinion Circuit Court of Appeals; Rec., 160), and by its mandate commanded the lower court to dismiss petitioner's bill. (Rec., 200.)

A petition for a rehearing was duly filed (petition, Rec., 201) and was denied without an opinion. (Rec., 219.)

Petitioner also moved the court to modify the mandate and thereby allow petitioner to file its amended bill in the court below and submitted with said motion the amended bill proposed (petition to modify, amended and supplemental bill), (Rec., 204), which motion was overruled without an opinion. (Rec., 219.)

Petitioner shows that the Court of Appeals has misconstrued the opinion and decision of this court in *James v. Railway Company*, 161 U. S., 545, in holding that petitioner is an Indiana corporation for purposes of jurisdiction in the Federal courts, but is a Kentucky corporation for purposes of liability under the laws of Kentucky to a general unsecured indebtedness *in personam* by virtue of a statute held by Mr. Justice Brewer and Mr. Justice Jackson to be simply an enabling act conferring powers upon petitioner as an Indiana corporation.

That the judgment of the Court of Appeals in effect reverses the deliberate judgment of Mr. Justice Brewer and Judge Jackson, later a judge of this court, in dismissing a bill of complaint on which they granted an injunction on the 28th day of May, 1890, upon an elaborate argument of counsel, lasting almost two days, on the construction of the statutes of Indiana and Kentucky, and in which judgment Judge Lurton, Circuit judge, and Judge Barr, District judge, sitting in chancery, afterwards followed.

That the decision of the Court of Appeals holds that the doctrine of *Buchanan v. Leitchfield*, 102 U. S., 278, *School District v. Stone*, 106 U. S., 187, and *Dennett v. Evansville*, 161 U. S., 441, does not apply to *quasi public* corporations like railroads, but is limited to municipal corporations, which is a novel departure from settled principles, fraught with most dangerous consequences to the rights of stockholders, and directly antagonistic to the principles announced by Justices Brewer and Jackson, and which, if adhered to, will destroy the uniformity of decisions touching the most important questions that can arise in any court having cognizance of statutory corporate powers and great corporate securities and estates.

Fourth. The original bill alleges:

(a) That petitioner as complainant therein was an Indiana corporation.

(b) That it was created in 1881 by consolidation of certain Indiana and Illinois railroad companies.

(c) Article three of the articles of consolidation under which petitioner exists, limits its source of corporate powers for exercise to the laws of Indiana and Illinois.

Fifth. The Contract Company agreed with the Beattyville Company to build its road from Versailles to Beattyville, distance about ninety miles, (its nearest terminus to Louisville being about sixty-five miles; see Am. & Sup. bill, Rec., 209) and to take as part pay part of the stock and all of the first bonds of the Beattyville Company. (See contract, record, p. 16.) A quorum of petitioner's directors without corporate power or authority, agreed with the Contract Company to guarantee the Beattyville bonds and to receive three-fourths of the Beattyville stock that came to the Contract Company for construction.

The contract with the Ohio Valley Improvement and Construction Company for the guaranty in question contains the provisions and recites the form of the guaranty to be endorsed, as follows:

" 4th. The said New Albany Company agrees to and with the said Construction Company that it will, from time to time, as the said first mortgage bonds are earned by and delivered to the said Construction Company pursuant to the terms of their said Construction Contract, guarantee the payment by the said Beattyville Company of the principal and interest of the said bonds in manner and form following; that is to say, by endorsing upon each of said bonds a contract of guaranty as follows:

“For value received the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond the payment by the obligor thereon, of the principal and interest thereof, in accordance with the tenor thereof. In witness whereof the said Railway Company has caused its corporate name to be signed hereto by its president, and its seal to be attached by its secretary.’

“6th. In consideration of the premises, the said Construction Company agrees to transfer and deliver to the said New Albany Company three-fourths of the entire capital stock of the said Beattyville Company, the said delivery to proceed *pari passu* with the guaranteeing of the said bonds by the said New Albany Company: \$3,000 at par of the said stock being delivered for each \$4,000 of bonds guaranteed.”

The guaranty in the above form was actually endorsed on 1,185 of said bonds and was signed in the following form:

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,

By W. M. DOWD,

[SEAL.]

President.

ATTEST:

JOHN A. HILTON,

Assistant Secretary.

(See contract, record, page 16.)

Sixth. On October 9, 1889, the executive officers of petitioner, without corporate power or authority, assumed to execute in the name of petitioner with the Contract Company, a paper writing, by which the payment of the principal and interest of \$2,250,000 of the Beattyville bonds were to be guaranteed by petitioner as the

same were issued and delivered by the Beattyville Company to the Contract Company for construction work, and the Contract Company was to issue and deliver three-fourths of the \$1,695,000 of the Beattyville stock received by it from the Beattyville Company under the construction contract.

Seventh. That the next day after such last authorized endorsement had been attempted, the annual meeting of the stockholders of petitioner convened for the election of the new board of directors, and thereupon adjourned to convene March 22, and at such adjourned meeting the new board reported that at a special meeting of the old board, held in the city of New York, October 9, 1889, only eight of the thirteen old directors were present, and they assumed to pass a resolution authorizing the execution of the aforesaid paper writing and guaranty of the Beattyville bonds thereunder; that such action was so taken by these eight directors without any notice to the other directors or stockholders of petitioner; that at that date the eight directors so assuming to act only held and owned in the aggregate some 400 shares of petitioner's stock out of 50,000 shares. (See original bill, Rec., 1, and proposed amended bill, Rec., 204.)

That thereupon the stockholders at such adjourned meeting, by resolution and by vote of over 32,000 shares of stock, *repudiated said paper writing and refused to approve the same*; that this was the *first* stockholders' meeting that convened, and the *first* notice these stockholders had of the attempted execution of this contract or of the guaranty on such bonds thereunder, and authorized legal proceedings to be taken, if necessary, to have such unauthorized and illegal contract and attempted guaranty canceled and their attempted enforcement

against petitioner enjoined; that notice of this repudiation was immediately served upon the Contract Company, and the cancellation of the attempted guaranty demanded; that on the 9th day of April, 1890, eighteen days after such repudiation by petitioner's stockholders, it filed its original bill for relief against such pretended contract and guaranty as therein prayed.

Eighth. After petitioner became an Illinois and Indiana corporation by consolidation, the Indiana legislature passed an act and therein expressly prohibited the guaranty of any railroad bonds in a foreign state by a mere resolution or act of directors or agents. (See sections, Indiana laws, 3951 a, b, c, Ex. D.)

The following facts were admitted and stipulated into the record by appellants:

" That no petition of any of the stockholders of the said company requesting said endorsement in the manner pointed out in section 3951 A. B. C. of the statutes of Indiana, or in any other manner was ever signed or executed, and no authority was conferred by said stockholders upon such directors, and such directors had *only* such authority as existed by virtue of their existence as such directors.

It is further agreed that the guaranteed bonds referred to, numbered from one to 600 inclusive were endorsed with such guarantee by the officers of the Louisville, New Albany and Chicago Railway Company on the day of December, 1889; that 585 of such bonds number from 601 to 1,185, inclusive, were so endorsed and delivered on the 11th of March, 1890; that the regular meeting of the stockholders of the Louisville, New Albany and Chicago Railway Company convened on the next day, March 12, 1890, and no meeting had been held after the above contract of guarantee had been entered into until such regular meeting was held on the 12th day of March, 1890, and on which day a majority of the board of directors were changed, and such meeting then

adjourned to the 22d day of March, 1890; that at such adjourned meeting the board of directors reported to the stockholders that the before mentioned bonds had been guaranteed, and a resolution was adopted by a majority of all the outstanding stockholders objecting thereto and disclaiming any liability by reason of such guarantee." (See stipulation, Rec., 60.)

Ninth. During the period covered by the foregoing transactions, petitioner was not authorized by any Illinois law to purchase the stock or guarantee the debt of any other corporation or enterprise,

APPELLANTS' DEFENCES.

Tenth. Appellants by answer denied that petitioner was an Indiana corporation and averred that when it filed its bill it was a corporation organized and existing in the State of Kentucky, pursuant to a special act of the legislature of that state, approved April 8, 1880, (about 13 months later petitioner was created an Inter State Company by consolidation of Indiana and Illinois corporations, aforesaid). That Section 1 of this alleged special Kentucky charter recites: "That the Louisville, New Albany & Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, etc."

Section 2 limits the power conferred to the acquirement of terminal facilities in the City of Louisville. It neither authorized the acquirement by purchase or construction of a road in Kentucky. It made no provision for the issue of stock for stockholders, or for directors or executive officers; it had no natural persons for incorporators.

(See this act, Exhibit A, hereto attached.)

Appellants further answered that the Kentucky amendment to this act approved February, 1882, authorized the guaranty in question.

(See amendatory act, Exhibit C, hereto attached.)

The first section of which reads: "That the Louisville, New Albany & Chicago Railway Company (not its directors because it had none) is hereby authorized and empowered to endorse or guaranty the principal and interest of the bonds of any railroad company now constructed or to be hereafter constructed within the limits of the State of Kentucky, etc."

Eleventh. Petitioner alleges in its pleadings.

(a.) That it never acted as a Kentucky corporation.

(b.) That after its creation by consolidation its Indiana constituent never held a stockholders' or directors' meeting and never had any executive officers whatever.

(See amended bill, Rec., p. 206.)

Petitioner attaches hereto, and as part hereof, all the provisions of the Kentucky and Indiana acts, the construction of which is here involved, including those cited and quoted in the opinion of the Circuit Court of Appeals, and also certain provisions contained in the articles of consolidation creating petitioner a corporation of Indiana and Illinois, to wit:

1. Sections 1 and 2 of the Kentucky act of 1880, marked Exhibit A.
2. Certain provisions of the articles of consolidation, marked Exhibit B.
3. Certain provisions of the amendatory Kentucky act of 1882, marked Exhibit C.
4. Section 3951, a, b, c, of the Indiana act of 1883, marked Exhibit D.

5. Certain provisions of the revised statutes of Indiana, marked Exhibit E.

The construction of the provisions of the foregoing statutes material to this case by Judge Barr, which followed the holdings of Justices Brewer and Jackson, and Circuit Judge Lurton, hereto attached and marked Exhibit F.

THE CONCLUSIONS REACHED BY THE CIRCUIT COURT OF APPEALS ARE INCONSISTENT AND DIRECTLY IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The Circuit Court of Appeals held :

1st. After holding that petitioner was not a Kentucky corporation and that if it was, it was not as such a party to this suit (op. Rec. p. 167) it held that it was the intention of the Kentucky legislature "to make that which was an Indiana corporation a corporation of the state of Kentucky" (op. Rec. p. 168) and that as such Kentucky corporation petitioner had the power under the Kentucky law to make the contract in question.

2d. It also held that the Kentucky act of 1880 created petitioner a corporation in Kentucky but inasmuch as petitioner was the *sole* incorporator named in that act and was a corporate citizen of Indiana, its corporate citizenship could not be imputed to Kentucky. Therefore petitioner as such Kentucky corporation must be deemed and taken as a corporate citizen of Indiana : That is, Kentucky by this act created a Kentucky corporation in Indiana with Kentucky powers for exercise (op. Rec. p. 168).

It then held that as to forty-five bonds petitioner was liable as a Kentucky corporation but was not liable "as a corporation of Indiana and Illinois," notwithstanding it held :

- (a.) That petitioner was not a Kentucky corporation :
- (b.) That if there was such Kentucky corporation it was not a party to this suit :
- (c.) That if the Kentucky act did create a corporation, it and the Indiana company were distinct corporations.

Neither the directors in assuming to authorize the contract or guaranty or the executive officers in signing the same, purported or assumed to act for or in the name of the Kentucky corporation, which in fact had no directors, stockholders or officers.

Yet the Circuit Court of Appeals held that the guaranty was in fact executed by the Kentucky corporation as well as by petitioner, as a corporation of Indiana and Illinois, and as to forty-five bonds the court of appeals ordered that the same be "stamped under the endorsement of the guaranties the words 'This guaranty is binding only on the Louisville, New Albany & Chicago Railway Company, a corporation of Kentucky. It is not binding on the Louisville, New Albany & Chicago Railway Company a corporation of Indiana and Illinois.'

"The complainant (your petitioner) is also entitled to an order enjoining suit on these bonds as a corporation of Indiana and Illinois."

Thus the Circuit Court of Appeals held that two corporations were jointly bound by the guaranty ; *first*, the Kentucky corporation, and *second*, petitioner, as "a corporation of Indiana and Illinois," although only signed by one, and by the above order released petitioner as the latter corporation and held the Kentucky corporation, thus making another and different contract of guaranty.

3d. The Court of Appeals further held: That as to purchasers with knowledge the guaranty is void, *because* the directors had no statutory power to authorize the execution of the guaranty and could have no authority to direct the same without petition from the stockholders as required in the Indiana act of 1883; but as to purchasers without notice the actual endorsement of the guaranty by such unauthorized direction of the directors bound the stockholders without their knowledge or consent, notwithstanding their prompt repudiation of both contract and guaranty. (op. Rec., p. 179. See opinion Circuit Court of Appeals, record 166. Finding and holding of Judge Barr, in the court below, that the repudiation was promptly made at the first meeting upon first notice, record 69.)

4th. That the Kentucky company passed into the consolidation of the Indiana and Illinois corporation *without* it appearing in the articles of consolidation that such Kentucky company was a party thereto by name or reference, said articles being only executed by the Louisville, New Albany and Chicago Railway Company *as* an Indiana corporation.

5th. That where a special power is vested *by express* statute in a designated body for exercise, a purchaser may presume that the same has been exercised by *such* body from the *mere* act of some *other* body, or from the *mere* manual signature of an executive officer of the corporation.

6th. That the *mere* act of the stockholders in electing directors, clothed the directors with the appearance of authority to exercise special power in addition to general or usual powers, notwithstanding the legislature vested the exercise of such special powers exclusively and

directly in the stockholders, and counsel for appellants admitted in their stipulation, as heretofore shown, that "*such directors had ONLY such authority as existed by virtue of their existence as such directors.*"

7th. That notwithstanding the question as to whether the Beattyville bonds were within the Indiana statute for guaranty had been expressly committed by the Indiana legislature to the stockholders for decision, persons purchasing the Beattyville bonds with the guaranty endorsed thereon might presume that that question had been determined by the stockholders even though such bonds were not within the Indiana statute.

8th. That the stockholders did promptly determine the question at the first notice and by resolution repudiated the contract of guaranty, which action of the stockholders was wholly disregarded by the court. (Op. Rec., 197 ; opinion Judge Barr, Rec., 69.)

9th. That a statute expressly vesting special power in the stockholders for exercise is a mere regulation between the members, and of the same effect as if written in the articles of incorporation or by laws.

10th. That a purchaser may indulge a presumption which becomes a substitute for special statutory authority to the agent, and that this presumption arises in the absence of the receipt of any consideration by the guarantor from the purchaser and in the absence of recitals or representations sufficient to create or feed an estoppel.

11th. The decision of the Circuit Court of Appeals in the above particulars and in other fundamental matters is in vital conflict with the decisions of this court and the rule uniformly applied in the interpretation and construction of statutes, creation of corporations, corporate powers and corporate agencies.

The importance of maintaining unbroken this line of Supreme court precedents touching these questions cannot be over rated. The one great objection urged in Congress to the Circuit Court of Appeals act was that it would make possible diverse decisions touching questions of gravity and importance. It was to obviate this objection that the clause for petition of *certiorari* was inserted.

12th. That your petitioner has no right of direct appeal or writ of error to this court under the Circuit Court of Appeals act, wherefore, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the sixth circuit, requiring said court to certify and transmit to this court a full and complete transcript of the record and all proceedings in that court in the above entitled cause, for review and determination by this court, as provided by law and that the judgment of reversal entered by said Circuit Court of Appeals may be reversed, with directions to it by this honorable court to affirm the decree of the court below.

And so your petitioner will ever pray.

*The Louisville, New
Albany & Chicago Railway Company.*

By G. W. KRETZINGER,

E. C. FIELD,

JAMES S. PIRTLE,

Solicitors for Petitioner.

STATE OF ILLINOIS, }
 COOK COUNTY. } ss.

Loyal L. Smith, being duly sworn states that he is a member of the law department for the petitioner, the Louisville, New Albany & Chicago Railway Company, and as such affiant is duly authorized to make this affidavit; that he has read the foregoing petition and that the facts therein stated are true.

LOYAL L. SMITH.

Subscribed and sworn to before me on this 4th day of November, 1896.

JOHN J. ROONEY,

Notary Public.

[NOTORIAL SEAL.]

The provisions of various statutes, and the articles under which petitioner was created an Illinois and Indiana corporation, the construction of which is here involved, including those cited and quoted in the opinion of the Circuit court of Appeals, and referred to in the petition as Exhibits A, B, C and D, are as follows:

EXHIBIT "A."

Sections 1 and 2 of the Kentucky act under which the court of Appeals held that petitioner was created a Kentucky corporation, and thereupon became a corporate citizen of Indiana, are as follows:

Be it enacted by the General assembly of the commonwealth of Kentucky:

" 1. That the Louisville, New Albany and Chicago Railway Company, *a corporation organized under the*

laws of the State of Indiana is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations and authority to operate a railroad."

" 2. That the Louisville, New Albany and Chicago Railway Company is hereby authorized to purchase or lease for depot purposes in the city of Louisville, or county of Jefferson such real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machines shops and for all switches, and turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same, and for all such purposes shall have the right to condemn all property required for the carrying out of the objects herein named, and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights and franchises."

EXHIBIT B.

Certain provisions contained in the articles of consolidation under which petitioner was created a corporation of Indiana and Illinois of date May 5, 1881, are as follows:

" This agreement was made this 5th day of May, A. D. 1881, between the Louisville, New Albany & Chicago Railway Company as party of the first part, and the Chicago and Indianapolis Air Line Railway Company, as party of the second part :

Witnesseth : That whereas the party of the first part is a corporation existing under the laws of the State of Indiana, with a share capital of \$3,000,000, and has constructed, owns and operates a line of railroad extending from the city of New Albany, Floyd county, Indiana, to

Michigan City, La Porte county, in the same state, and

Whereas, the said party of the second part is a consolidated corporation, *organized and existing under the laws of the states of Indiana and Illinois* with a share capital of \$2,000,000 and has in process of construction a line of railway extending from the city of Indianapolis, Marion county, Indiana, to a connection with a railroad at or near Glenwood, Cook county, Illinois, so as to secure a connection and entrance to the city of Chicago, Illinois, and

Whereas, the lines of railroad so described as aforesaid and belonging respectively to said parties of the first and second parts intersect and connect with each other at Bradford, White county, Indiana, so as to allow the free interchange of traffic between each other, and if joined, united and consolidated, would form a line of railroad connected from the cities of New Albany and Indianapolis, Indiana, to the city of Chicago in the State of Illinois, and

Whereas, the said parties hereto have full power and authority *under the laws of the States of Illinois and Indiana* to consolidate their stocks and properties, * *

Now, therefore, in consideration of the premises * *

* the first and second parties do hereby mutually covenant and agree * * * to unite, merge and consolidate the said two corporations and all their railroads, properties, stock and franchises of every kind so as to create and form a consolidated corporation, to be called and known as the "Louisville, New Albany & Chicago Railway Company," on the terms and conditions hereinafter specified.

Article 2 conveys to such consolidated company all the properties and franchises of the Indiana and Illinois constituents.

Article 3 provides that "the said consolidated corporation hereby created shall be vested with all the rights, privileges, immunities and franchises which usually pertain to railroad corporations under the laws of the respective States of Illinois and Indiana," etc.

Article 4 made the united stocks of the constituents the authorized issue of the consolidated stock and made stockholders of the constituents stockholders of the consolidated company with the right to exchange constituent for consolidated stock, upon the basis agreed upon.

Article 7 provided that immediately upon the consummation of the consolidation the board of directors of the first party, the Indiana constituent should constitute the board of directors of the consolidated company until its first election.

(See articles of consolidation record pp.).

At that date there was *no law* in force in Indiana or Illinois authorizing railroad corporations of those states to guarantee bonds of another corporation in their own or in adjoining states, and the absence of such power was in full legal effect an express prohibition against its exercise.

C.

About a year after petitioner was created by the consolidation of Indiana and Illinois companies as aforesaid the Kentucky legislature passed an act which the Circuit Court of Appeals held authorized the executors officers of petitioner to make the guaranty in question, to wit :

Be it enacted by the General Assembly of the Commonwealth of Kentucky :

" 1. That the *Louisville, New Albany & Chicago Railway Company* is hereby authorized and empowered to indorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the State of Kentucky, and may consolidate its rights, franchises and privileges with any railway company authorized to construct a railroad from the City of Louisville to any point

on the Virginia line, such endorsement, guarantee or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the State of Kentucky; provided it shall not lease or consolidate with any two lines of railway parallel to each other; or it may make such traffic arrangement or agreement with any such before mentioned road as its board of directors may deem proper."

"2. This act shall take effect upon and after its passage.

Approved April 7, 1882.

D.

Nearly two years after petitioner was created by such consolidation the Indiana legislature enacted the law approved March 8, 1883, to wit:

"3,951 a. Guaranty of Bonds of another Company. The board of directors of any railroad company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the state in either direction, *may*, UPON THE PETITION OF THE HOLDERS OF A MAJORITY OF THE STOCK OF SUCH RAILWAY COMPANY, direct the execution by such railway company of an endorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so endorsing or guaranteeing such bonds."

"3,951 b. Petition of stockholders. 2. *The petition of the stockholders specified in the preceding section of this act SHALL STATE THE FACTS relied on to show the benefits accruing to the company endorsing or guaranteeing the bonds above mentioned.*

"3,951 c. Limitation of the power. 3. No railway company shall, under the provisions of this act, endorse or guarantee the bonds of any such railway company or companies as is above mentioned, to an amount

exceeding one-half of the par value of the stock of the railway company so endorsing or guaranteeing as authorized under this act."

There was no law in force in Illinois authorizing either a domestic corporation of that state or any Illinois constituent of a consolidated interstate company to purchase the stock or guaranty the debt of any other corporation, corporation or enterprise.

EXHIBIT E.

The general statute of Indiana from which the court of appeals in its opinion quoted from two sections *only*, (namely Secs. 3949 and 3951), consists of seven sections which appear in the Revised Statutes as Sections 3449 to 3951 inclusive.

The following being the only provisions material to the question here presented, which include the provisions quoted by the Court of Appeals:

3945. **ROADS. HOW SOLD.** 1. In case of the sale of any railroad and its property under or by the authority of any competent court or courts (part of which railroad may be situate within the State of Indiana, and part situate in an adjoining state, and embraced in the mortgage or mortgages or deed or deeds of trust), it may be sold at one time and place as an entirety, at such point on the line of said railroad, either within or without the state, and upon such notice as the court or courts ordering such sale may direct.

3946. **INCORPORATION BY PURCHASERS.** 2. In case of the sale of any railroad and its property (now situated wholly or partly within this state, *or* situated partly in this state and partly in an adjoining state), by virtue of any mortgage or mortgages, or deed or deeds of trust, either by foreclosure or other judicial proceedings, or

pursuant to any power contained in such mortgage or mortgages or deed or deeds of trust, or by the joint exercise of such powers and authorities, the purchaser or purchasers thereof * * * may form a corporation, by filing in the office of the Secretary of State a certificate specifying, etc.; and the persons signing said certificates and their successors, shall be a body corporate, and politic by the name in said certificate specified, *with power* to sue and be sued, contract and be contracted with, *and maintain and operate the railroad in said certificate named*, etc.

3947: " * * * And provided further that such corporation when so formed and organized shall in suing and being sued, *and in operating such railroad be subject to the general laws of this state* and NOT INCONSISTENT WITH THE ORIGINAL CHARTER OF SAID RAILROAD AND THE AMENDMENTS THERETO.

3949: *Note.* "The *original* charter" means the Indiana charter provided for in Sec. 3946. " * * * The said corporation shall have capacity to hold, enjoy and exercise within other states the aforesaid faculties powers, rights, franchises and immunities, and such other as may be conferred upon it by any law of this state or of any other state in which any portion of its railroad may be situate or in which it may transact any part of its business."

Note. This provision of Sec. 3949 was quoted by the court of appeals. The "said corporation" is such and only such as are incorporated under 3946, the powers of which are restricted by Sec. 3947 and cannot be inconsistent with the "*original*" (Indiana) "*charter*."

3951. *Purchase and consolidation of branch roads.*
(The following quoted in opinion Circuit Court of Appeals):

7. Any railroad company incorporated under the provisions of this act shall have the power and authority to acquire by purchase or contract the road, road bed, real and personal property, rights and franchises of any other corporation or corporations, which may cross or intersect * * * may also purchase or contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining states; and may assume such of the debts and liabilities of such corporation as may be deemed proper. (The following not quoted or considered by Court of Appeals): *Upon purchasing any such railroad or railroads,* * * * the same shall become vested in the railroad company so purchasing the same, * * * AND THE COMPANY SO PURCHASING OR ACQUIRING THE TITLE TO OR USE OF SUCH RAILROAD OR RAILROADS SHALL HAVE POWER TO COMPLETE, MAINTAIN AND OPERATE THE SAME. Any railroad company incorporated *under the provisions of this act* shall also have power to consolidate with other railroad corporations in the continuous line, either within or without this state, upon such terms as may be agreed upon by the corporations owning the same. * * * *All railroads purchased* * * * shall be vested in and become a part of the property of the corporation so purchasing or constructing the same, as aforesaid; and shall be, in all things, governed by the laws, rules and regulations *governing the corporation purchasing* * * * the same, as aforesaid, and be operated as a part of its line of road. * * * *But the powers of consolidation and purchase* shall be, and are hereby, *limited and restricted to such roads within the State of Indiana* as may cross and intersect the same, etc.

EXHIBIT "F."

Touching the foregoing statutes, and upon final hearing, Judge BARR, among other things, held:

"The decision of Justice Brewer and Judge Jackson, after full consideration, that this court had jurisdiction of this cause and the granting of the injunction should, we think, settle for this court some of the questions argued by counsel.

This decision determined that the complainant is an Indiana corporation and not a Kentucky one; hence, whatever authority the complainant had or has to guarantee the mortgage issued by the Richmond, Nicholasville, Irvine and Beattyville Railroad Company is derived from the corporate powers granted by that state. It also determined that upon the then showing the complainant was entitled to an injunction to prevent the disposition by the Ohio Valley Improvement and Contract Company and others of the bonds of the Beattyville Railway Company with the guarantee of the complainants upon them.

* * * * *

The consideration of the guarantee on the coupon bonds of the Beattyville Railway Company was to be the delivery of three-fourths ($\frac{3}{4}$) of the capital stock of that railway company to complainant by the Ohio Valley Contract Company.

The guaranty which was endorsed on \$1,185,000 bonds is as follows":

(Then follows the words of the guaranty as heretofore shown.)

The court then cites sections 3951-a, b and c, of the Indiana statutes, which is fully quoted with the other statutes here presented. Judge Barr then continued:

"The provisions of the Indiana statute seem to have been ignored and the guaranty made presumably under the supposed authority of an act of the State of Kentucky approved April 7, 1882. *But as complainant is not a Kentucky corporation, this guaranty cannot be sustained or aided by this statute.*

By the Indiana statute quoted * * * *the stockholders, and not the board of directors, are to take the initiative and a majority thereof determine whether there shall be a guaranty of the bonds of another company. * * * But the authority does not exist except by and through the stockholders.* The provision of this statute which requires the facts which are relied on to show the benefit accruing to the company endorsing or guaranteeing the bonds to be stated in the stockholders' petition, clearly shows *the authority to guarantee the bonds of another company was not intended to be given the board of directors.*

There is no question here as to the effect of a subsequent approval or ratification of the guaranty of these bonds by the board of directors, by the stockholders *as their action was promptly repudiated* by them the first meeting after the guaranty was made and presumably as soon as it was practical to have had a stockholders' meeting.

The court then refers to other Indiana statutes and to the provisions thereof stated and quoted in the opinion of the Circuit Court of Appeals and of them says :

"These powers are such as to consolidate with other railroad companies and to buy and lease by way of extension of their railway lines, other railroads, etc., but the authority to guarantee the bonds of another railroad company is given in express terms in section 3,951, and the mode prescribed, and we think this precludes any implied authority arising to guarantee bonds in cases covered by that section in the exercise of other corporate powers given in other parts of the statute."

Judge BARR then cited and quoted, and thereon held that the guaranty was void as between petitioner and the Ohio Valley Contract Company, and as to the rights of defendants as alleged innocent purchasers said:

"The nature of the contract should have been notice to all purchasers to inquire into the corporate powers of the guaranteeing railway company, *as it was unusual and out-*

side of the ordinary business of a railway company either in operating or constructing railroads.

Purchasers on the bond market were bound to know that the president and board of directors of complainant were not the corporation, but its agents, and that the corporate power to guarantee these bonds did *not ordinarily* exist in the directory. There were *no recitals* either in the resolution of the board of directors or in the guaranty itself to mislead the purchaser or stay inquiry. * * *

In speaking of notes and bonds issued or accepted by an agent, acting under a general or special power, the Supreme court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper *cannot* be used to establish the authority by which it was originally issued.' See *Floyd Acceptances*, 7 Wall., 676, and approved in *Marsh v. Fulton County*, 10 Wall., 683."

The judge then quotes *Merchants Bank v. State Bank*, 10 Wall., and said:

"This language is applicable as in that case where the company had the corporate authority to make the contract and the agent who made it was within the general scope of his duties, though not especially authorized to make the contract in controversy, *but it cannot be true*, broadly stated, else stockholders in corporations would be without the protection of limitations and conditions placed upon their corporation by the charter, *and the state itself* would be without the power to prescribe conditions to the exercise of corporate powers or prescribe the mode or agencies by which corporate powers should be exercised.

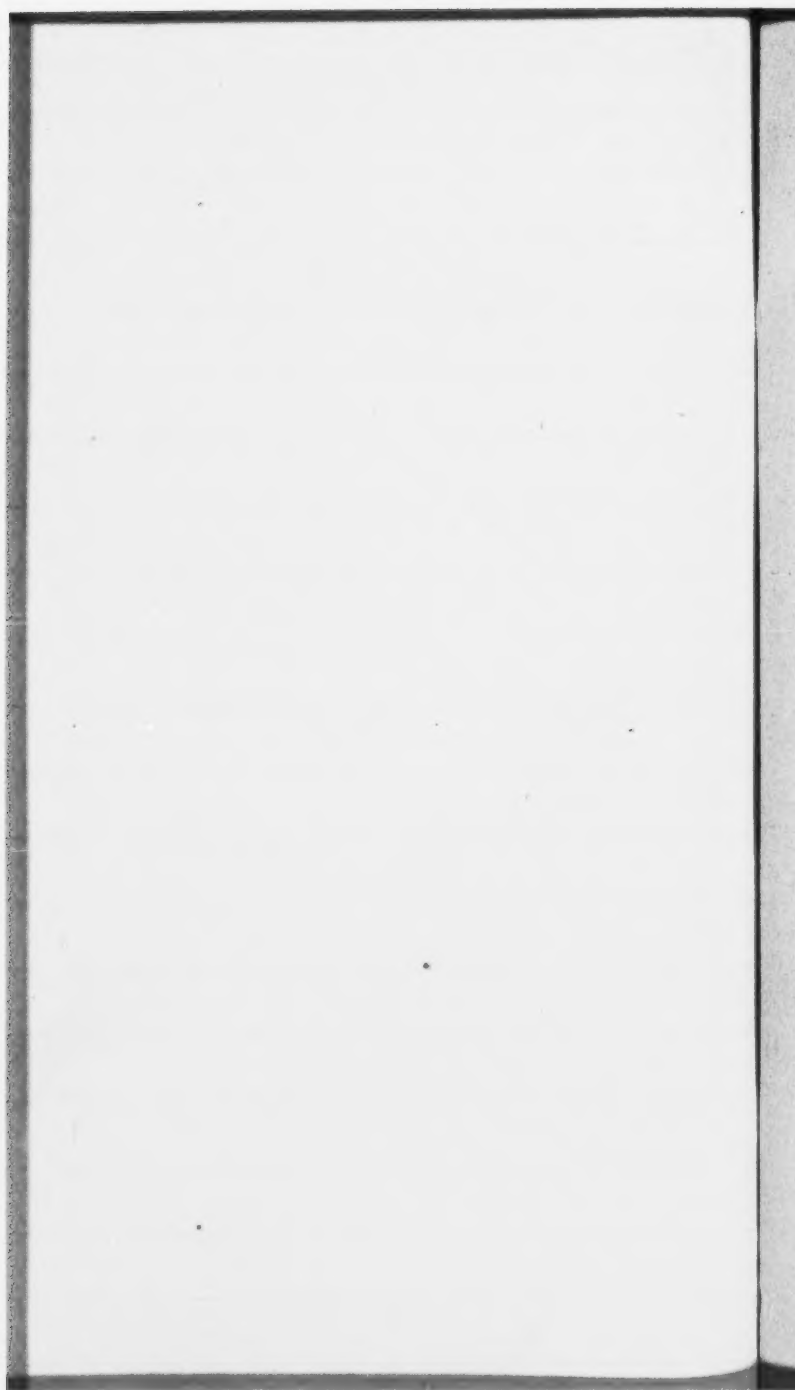
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This condition, precedent to the corporate authority of the board of directors, was not performed, or attempted to be performed. * * * We do not, therefore, see that the position of these bondholders who are *bona fide* purchasers without notice is other or different from that of the Ohio Valley Company."

Judge Barr concluded :

In the case at bar the initiative was to be taken by the stockholders and they were to determine whether there should be a guaranty and direct the directors by a petition in writing giving the facts upon which they based their determination. This extraordinary corporate power was to be exercised by the stockholders themselves, and not their agent, the board of directors, and in a way and manner that all who dealt with the corporation could know if they desired. These two cases, (*Tappan v. Ry. Co.* 1st Flippin, 75, and *Zabriskie v. Ry. Co.*, *supra*) both in principle and facts, fall far short of the present case."

In so holding Judge Barr adopted and concurred in the decisions of Associate Justices Brewer and Jackson and Circuit Judge Lurton, in overruling the plea to the jurisdiction of the court, in granting the motion for a temporary injunction, and in overruling the demurrer to the original bill and supplement as above stated.



Boyle, Humphrey & Davie
Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

Filed Mar. 16, 1897.

*895-
S.C.*

The Louisville Trust Company, - - - Appellant,

VERSUS

No. 646.

The Louisville, New Albany & Chicago Rail-
way Company, - - -

MAR 16 1897 Appellee.

The Louisville Banking Company, - - - Appellant,

VERSUS

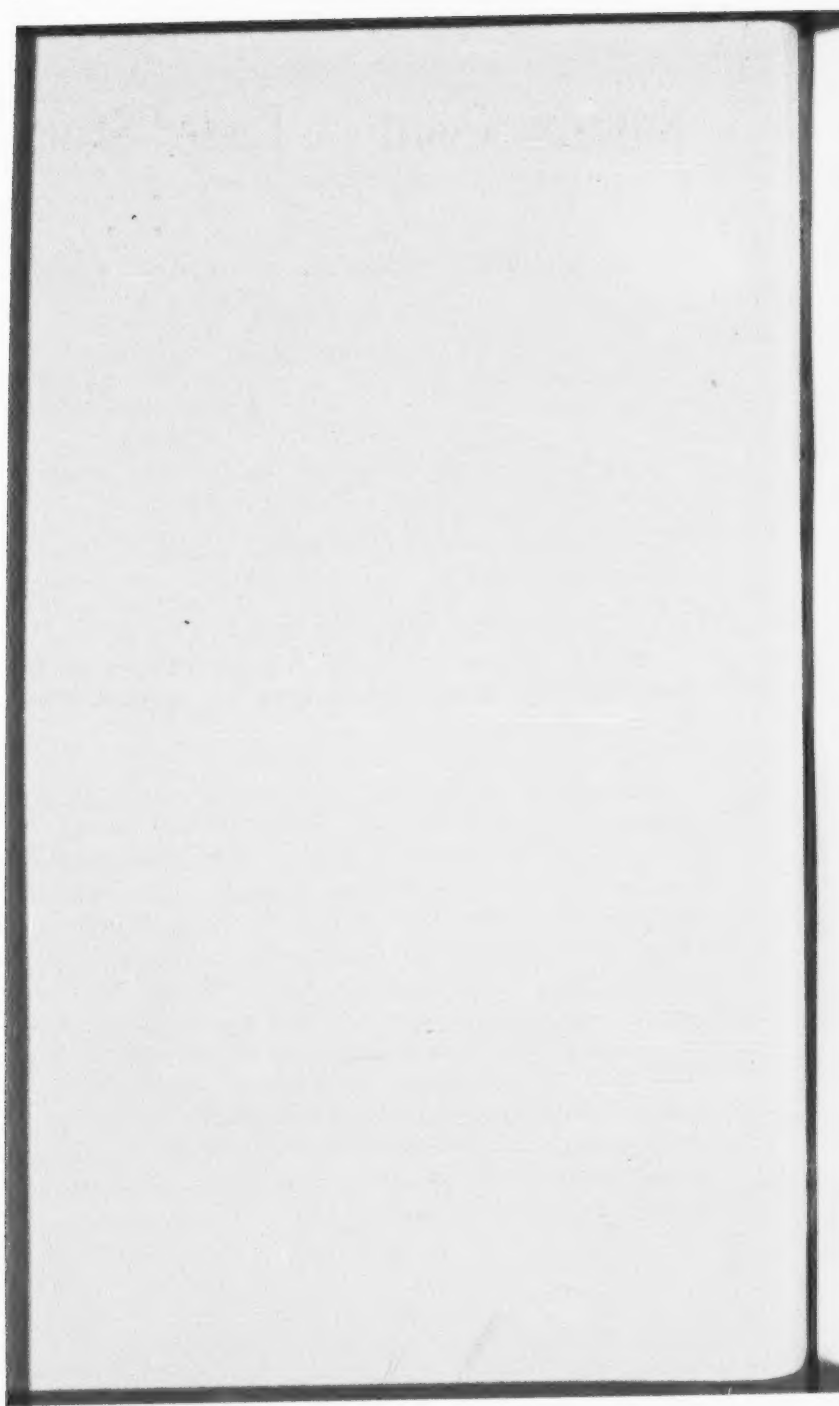
No. 646.

The Louisville, New Albany & Chicago Rail-
way Company, - - - - - Appellee.

BRIEF BY APPELLANTS ON MOTION OF APPELLEE FOR AN ORDER
DIRECTING CIRCUIT COURT TO VACATE ORDER
DISMISSING APPELLEE'S BILL.

SWAGAR SHERLEY,
ST. JOHN BOYLE,
ALEX. P. HUMPHREY,
GEO. M. DAVIE,
SHACKELFORD MILLER,

COUNSEL FOR APPELLANTS.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

THE LOUISVILLE TRUST COMPANY, - - - - *Appellant,*

Versus { No. 645.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAIL-
WAY COMPANY, - - - - - *Appellee.*

THE LOUISVILLE BANKING COMPANY, - - - *Appellant,*

Versus { No. 646.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAIL-
WAY COMPANY, - - - - - *Appellee.*

**Brief by Appellants on Motion of Appellee for an
Order directing Circuit Court to vacate Order dismiss-
ing Appellee's Bill.**

Those portions of the record and the other facts that are necessary to a consideration of the motion are fully set out by counsel for appellee in their brief, and will not therefore be here repeated. It may be well to state, however, that the order of the Circuit Court entered in obedience to the mandate of the Circuit Court of Appeals, dismissing the bill of appellee, also, of necessity, dissolved the injunction that the Circuit Court had granted, restraining the appellants from suing the appellee on its guaranty, and which guaranty the bill of appellee was brought to have cancelled. This is why the present motion is made, and not because of any fear lest the mandate of this court would be ineffective by reason of the dismissal by the Circuit Court of appellee's bill, should this court reverse the decision of the Circuit Court of Appeals.

I.

The issuance of the writ of certiorari by this court did not eliminate the decision of the Circuit Court of Appeals, nor affect any action of that court made prior to the writ's issuance.

It is contended by counsel for appellee in support of the present motion, that the granting of the writ of *certiorari* by this court has the effect of wiping out the entire action of the Circuit Court of Appeals, and that therefore the judgment of the Circuit Court granting the prayer of the bill, and enjoining the appellants, should remain in force until this court has finally passed upon the merits of the case.

The second paragraph of Section 6 of the Circuit Court of Appeals act provides :

“ And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require by *certiorari* or otherwise any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.”

The evident meaning of the above enactment is shown by the remainder of the section, where an appeal or writ of error in other cases exists as a matter of right ; the only difference between the two classes of cases being that in the former it is optional with this court to give a hearing, while in the latter it is a matter of right.

Section 10 of said act treats the cases that come by appeal or writ of error from the Circuit Court of Appeals to the Supreme Court, and those that come by *certiorari*, as to their being remanded to the Circuit Court, exactly alike, so that whatever

argument might be drawn from that section to indicate the elimination of the Circuit Court of Appeals in cases like the one at bar, applies with equal force to the other class of cases that go to this court by appeal or writ of error, and, of course, that is manifestly absurd. If this be true, the rights of the appellee are the same as if the case was here by appeal or writ of error, and certainly in such a case the judgment of the Circuit Court of Appeals would remain in full force until a decision by this court on the merits, notwithstanding a supersedeas had been obtained. In the "Slaughter House Cases," 10 Wal. 273, this court said:

"Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle the appellant to stay the proceedings pending the appeal as matter of right, either in a suit at law or in equity."

And in those cases it was held that the order of the Supreme Court of Louisiana dissolving the injunction of the plaintiffs in error was not annulled by a writ of error to this court, notwithstanding plaintiffs in error had complied with all the requirements of the 23d section of the Judiciary Act as to a supersedeas. The same rule was laid down in *Hovey v. McDonald*, 109 U. S. 161, and *Leonard v. Ozark Land Co.*, 115 U. S. 465. In 4 Dana (Ky.) 599, *Runyon et al. v. Bennett*, the Court, through Judge Marshall, said:

"A supersedeas suspends the efficacy of a judgment, but does not, like a reversal, annul the judgment itself. Its object and effect are to stay future proceedings, and not to undo what is already done. It has no retroactive operation so as to deprive the judgment of its force and authority from the beginning, but only suspends them after and while it is itself effectual. A consequence of this is, that whatever is done under the judgment, after and while it is superseded, being done without authority from the judgment, which is then powerless, and against the authority and mandate of the supersedeas, should be set aside as improperly and irregularly done, but that whatever is done according to the judgment, before the supersedeas takes effect, is upheld by the authority of the judgment, and is not overreached by the supersedeas."

II.

A writ of certiorari operates as a supersedeas only from the time of its service.

As was said in the case of *Ewing v. Thompson*, 43 Pa. St. 372, "the writ of *certiorari* is not in itself a writ of supersedeas, but it operates as one by implication." This is the result of the theory of the law, that the actual record of the inferior court is certified up to the higher tribunal, though in fact only a certified copy is sent.

After the writ is issued, in the eyes of the law, there remains nothing concerning which the inferior court can act. It necessarily follows that there can be no supersedeas until the writ is served on the lower court, and all acts done prior to that time are valid, and, indeed, where an execution has been issued to an officer before the writ of *certiorari* is served, the execution will not be recalled, and the sheriff is not guilty of contempt in proceeding to execute it.

In the case of *McWilliams v. King and Phillips*, 32 N. J. L. 23, the following cases are cited as illustrations of the procedure at common law :

"In *Prince v. Allington*, Moore, 677, it is said that if justices of the peace receive a *certiorari*, all that they do after is erroneous, but what the sheriff does after, on a warrant received before, is not erroneous, and yet their negligence (that is, the negligence of the justices) is punishable by attachment as contempt. And in *King v. Spilman*, 1 Keb. 93, pl. 79, the court, sustaining the same doctrine, remarks that the hands of the justices are closed by the issuing of the *certiorari*, though they be not in contempt for what they have done before the delivery of it, but they ought to have awarded a supersedeas immediately upon the receipt of the *certiorari*. And the same principle was still more distinctly presented in *Regina v. Nash*, 1 Salk. 147, the second reso-

lution of the court being embodied in these words: 'That this court had no power over the warrant, being granted before the *certiorari* issued, and therefore they refused to make a rule upon the constable to return it.' To the same effect are the following authorities: 2 Hawk. P. C. 293; Bacon's Ab., *Certiorari* G; F. N. B. 237."

In *Gaertner v. The City of Fond du Lac, &c.*, 34 Wis. 503, it is said:

"The general rule is that a *certiorari* to a subordinate tribunal operates as a stay of proceedings from the time of its service, unless the judgment or order complained of has begun to be executed."

Not only is an execution in the hands of an officer not stayed, but also in the case of *The City of Macon v. Shaw*, 14 Ga. 164, it was said:

"The granting of a *certiorari* does not revoke a judgment executed, or in process of execution. The effect of the writ, when allowed, is to stay all further action on the record, and its powers can not be extended by special order of the judge of the Superior Court."

See also 13 Wendell (N. Y.), 664; 9 Johns. (N. Y.) 66; 3 Hill (N. Y.), 239.

As the mandate of the Circuit Court of Appeals was issued and obeyed before this Court granted a *certiorari*, the order dismissing the bill, can, we think, only be set aside as a result of a decision by this Court on the merits.

III.

The stipulation entered into by counsel for appellants and appellee had no other effect than to abridge the record.

The point made by counsel on the stipulation entered into herein is so extraordinary and of such doubtful ethical nature that we feel disposed to ignore it entirely were it not for the

extreme complacency with which counsel disaffirm any intention of "imputing any unfairness on the part of counsel (for appellants) in their subsequent insistence for judgment of dismissal upon the mandate of the Circuit Court of Appeals."

The agreement was entered into as a favor to counsel for appellee to save them the trouble, and at the expense of a complete transcript in each case when a special one in two of the cases would suffice. It was never supposed by any one that it could, in any way, affect the rights of the parties, and we are certain that not even the extraordinary ingenuity of counsel can twist it so as to have any such effect. The stipulation provides simply that two of the cases should be further contested, and that the result should be abided in as to the other cases, and the reason of the stipulation is given in these words:

"For the reason that the pleadings and proceedings in the said two cases of the Louisville Trust Company, appellant, and the Louisville Banking Company, appellant, against the Louisville, New Albany & Chicago Railway Company, appellee, presents the full issues involved in this record."

There is nowhere an intimation that appellants should not insist on any and all rights they might have under the mandate of the Court of Appeals. There was no reason and no consideration for any waiver of rights, and none was made. The stipulation, as made, has been, and will be, kept in its entirety, but we shall vigorously protest against an unwarranted attempt to extend it to matters never embraced by it. We refrain from any further discussion of the stipulation, as it would serve only to dignify a very extraordinary contention.

IV.

The motion of appellee should be sustained, if at all, only on the condition of the execution of a bond.

We believe for the reasons already set forth, that the motion of appellee should be overruled, but desire to most strenuously insist that if it is sustained, it be on condition that a suitable bond be executed by appellee to each original appellant, conditioned to pay all damages that they may suffer by the continuance of the original injunction until the decision of this court on the merits, if such decision be an affirmance of the Court of Appeals. This court clearly possesses the right to require such a bond if it possess the right to sustain the motion of appellee. When an appeal was taken by appellants from the decision of the Circuit Court, a bond was given to prevent the cancellation of the guaranty, and for costs; the injunction of the Circuit Court remaining in effect.

If, after a hard-earned victory in the Court of Appeals, appellants are to remain still bound on their supersedeas bonds, with their hands still tied by injunction, while appellee disposes of its entire property by foreclosures, their victory in this court can be but a barren one. Surely they are entitled to a bond in their favor if they are to be prevented until it may be too late from asserting their claims against appellee.

Respectfully submitted.

SWAGAR SHERLEY,
ST. JOHN BOYLE,
ALEX. P. HUMPHREY,
GEO. M. DAVIE,
SHACKELFORD MILLER,

Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1897.

THE LOUISVILLE TRUST COMPANY, - - *Appellant,*

No. 254.

VERSUS

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY, - - - - - *Appellee.*

THE LOUISVILLE BANKING COMPANY, - - *Appellant,*

No. 255.

VERSUS

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY, - - - - - *Appellee.*

STATEMENT.

In 1889 the Louisville, New Albany & Chicago Railway Company, hereinafter called the "Monon," leased the railroad of the Louisville Southern Railroad Company, which railroad extended from Louisville to Lexington in Kentucky with a branch to Burgin, in Mercer County, Kentucky, on the line of the Cincinnati Southern. The Louisville Southern passed through Versailles, Ky., at which point there was then being constructed a railroad to Beattyville, Ky., where there were valuable coal fields. This company, the Richmond, Nicholasville, Irvine & Beattyville Railway Company (hereinafter called the Beattyville Company) had made a contract with the Ohio Valley Improve-

ment and Contract Company (hereinafter called the Contract Company), by which the said Contract Company had agreed to construct and equip the line of railroad. In consideration thereof the Railroad Company was to execute and issue to the Contract Company its first mortgage bonds at \$25,000 per mile, to transfer to the Contract Company the subscriptions it had received from communities and counties, and also to issue to the Contract Company all of its capital stock except that which would have to be issued on account of such subscriptions.

Under these circumstances the Monon Railroad Company, desiring to obtain access to the coal fields of Eastern Kentucky, made an agreement with the Contract Company, which was then engaged in the work of construction, by which it undertook to guarantee the payment of the Beattyville Company's bonds in consideration of receiving three fourths of the entire capital stock of the Beattyville Company. (Exhibit C to Original Bill. Tr. 16.)

The work of construction proceeded, and as the bonds were delivered to the Contract Company *pari passu* with the work done, the Monon Company endorsed its guaranty upon such bonds and received the proportion of the capital stock to which it was entitled under its contract until they had endorsed the bonds to the amount of \$1,185,000 and received \$888,750 of the capital stock of the Beattyville Company. (The form of said guaranty will be set out later.) These bonds were then put upon the market by the Contract Company, and purchased by many persons and corporations in good faith and without knowledge of any irregularity or lack of power or authority on the part of the "Monon" to make the guaranty. (The appellant, Louisville Trust Company, is such a holder of 125 of these bonds, while the appellant, Louisville Banking Company, is as to some of its bonds a holder with knowledge of the facts.)

Shortly afterward, the management of the Monon Railroad Company was changed at a stockholders' meeting; after which the new management repudiated the agreement to guarantee the

bonds, and on April 9, 1890, brought its bill of complaint in this cause for the purpose of canceling its contract with the Contract Company and its endorsement already placed upon the bonds.

The original bill which was filed in the Circuit Court of the United States for the District of Kentucky, alleged that the "Monon" was a corporation of the State of Indiana, and that the defendants, The Contract Company, the Beattyville Company, the Louisville Trust Company, and the natural persons made co-defendants were citizens of States other than Indiana. It charged that the contract with the Contract Company was fraudulent, and was made for the purpose of benefiting some of the directors of the company who became purchasers of some of the guaranteed bonds. A restraining order issued upon this bill, and the defendants having filed a plea to the jurisdiction, said plea and the motion of complainant for a temporary injunction were heard before associate Judge Barr and Circuit Judge Jackson, and the plea overruled and a temporary injunction granted.

Thereupon the Contract Company, being compelled to dispose of its bonds to continue its work, surrendered all the bonds in its possession which had been guaranteed and had the endorsement canceled upon them, and such endorsement has been canceled upon all but \$650,000 of the guaranteed bonds. At the time of the decision of the court on the plea to the jurisdiction, none of the *bona fide* holders of the bonds were before the court and no final decree was then entered.

Afterward a supplemental bill was filed setting up what had occurred on the original bill and bringing in most of these purchasers. Some of these new defendants filed demurrers which were heard and overruled by Circuit Judge Lurton and District Judge Barr, the court holding that on demurrer all defendants must be considered as standing in the same relation to complainant as the Contract Company. (See Opinion of court, Tr. 42.)

Answers were then filed denying any allegations of fraud, and alleging the purchase of the bonds in good faith and with-

out notice of any defect. As a matter of fact the fraud is disproved, but at any rate would have no effect upon the controversy with these purchasers.

The real controversy with these purchasers arose out of the grounds asserted in the bill, as follows:

1. That the Company was solely a corporation of the State of Indiana, and that the laws of that State did not authorize the execution of the guaranty; that the law of Indiana provided that such a guaranty could not be made except upon the petition of the holders of a majority of the capital stock of the Company; that there had been no such petition, and that therefore the guaranty by the Board of Directors was *ultra vires* and void, even as to *bona fide* holders for value and without notice.

2. That there was not a quorum of the Board of Directors when the resolution was passed authorizing the guaranty. This contention is disposed of by the stipulation on page 60 of the Transcript, wherein it is stated that the guaranty was authorized by the Board of Directors, but not by the stockholders.

On final hearing before District Judge Barr the guaranty was held void and ordered canceled, and suit thereon against the "Monon" was perpetually enjoined.

From that decree, nineteen defendants appealed, and the cause was heard before Taft, Circuit Judge, and Severens and Hammond, District Judges, and on June 22d, 1896, the opinion of the court was delivered by the Circuit Judge reversing the decree, holding the guaranty valid, and directing the lower court to dismiss appellee's bill. (Tr. 200.)

A petition for rehearing was denied, as was also a motion to file an amended bill. (Tr. 219.)

On November 9th, 1896, appellee petitioned this court to order by *certiorari* the Court of Appeals to certify said cause to this court, which was granted. By stipulation of counsel the two cases now before this court, were certified in lieu of the nineteen appeals heard in the Circuit Court of Appeals, it being agreed that the decision had in those two cases should apply to all the others. (Tr. 221.)

FORM OF GUARANTEE, STATUTES INVOLVED, AGREED FACTS, ETC.

The guarantee endorsed upon the bonds of the Beattyville Company by the "Monon" was in the following words:

"For value received, the Louisville, New Albany & Chicago Railway Company hereby guarantees to *the holder* of the within bond the payment by the obligor therein of the principal and interest thereof in accordance with the terms thereof.

"In witness whereof, the said Railway Company has caused its corporate name to be signed hereto by its President and its corporate seal to be attached by its Secretary.

The following statutes of Indiana and Kentucky need to be considered in determining the powers, rights, and obligations of the appellee:

STATUTES OF INDIANA IN FORCE MARCH 3, 1865.

Section 3945. *Roads, how sold.* 1. In case of the sale of any railroad and its property, under or by the authority of any competent court or courts (part of which railroad may be situate within the State of Indiana, and part situate in an adjoining State, and embraced in the mortgage or mortgages or deed or deeds of trust), it may be sold at one time and place as an entirety, at such point on the line of said railroad, either within or without the State, and upon such notice as the court or courts ordering such sale may direct.

Sec. 3946. *Incorporation by purchasers.* 2. In case of the sale of any railroad and its property (situated wholly or partly within this State, or situated partly in this State and partly in an adjoining State) by virtue of any mortgage or mortgages or deed or deeds of trust, either by foreclosure or other judicial proceeding, or pursuant to any power contained in such mortgage or mortgages or deed or deeds of trust, or by the joint exercise of said powers and authorities, the purchaser or purchasers thereof, their survivor or survivors, or he or his or they or their associates or assigns, may form a corporation, by filing in the office

of the Secretary of State a certificate specifying the name and style of the corporation, the number of directors, the names of the first directors and the period of their service (not exceeding one year), the amount of original capital, and the number of shares into which said capital is to be divided; and the persons signing said certificate, and their successors, shall be a body corporate and politic by the name in said certificate specified, with power to sue and be sued, contract and be contracted with, and maintain and operate the railroad in said certificate named, and transact all business connected with the same; and a copy of such certificate, attested by the signature of the Secretary of State or his deputy, shall, in all courts and places, be evidence of the due organization and existence of the said corporation and of the matters in said certificate stated.

Sec. 3947. *Franchise pass—Old stockholders released.* 3. Such corporation shall possess all the powers, rights, privileges, immunities, and franchises in respect to said railroad, or the part thereof purchased as aforesaid, and of all the real and personal property appertaining to the same which were possessed or enjoyed by the corporation that owned or held the said railroad, previous to such sale, by virtue of its charter and amendments thereto and other laws of this State, or of any State in which any part of said railroad is situate, not inconsistent with the laws of this State. And it shall have power, at any time after the formation of the corporation as aforesaid, to assume any debts and liabilities of the former corporation, and to make such adjustment and settlement with any stockholder or stockholders or creditor or creditors of such former corporation as may be deemed expedient, and for such purpose to use such portions of the bonds and stock of said corporation as may be deemed advisable and in such manner as said corporation may deem proper; Provided, That all subscribers to the original stock of said railroad company, their heirs, executors, and administrators, shall (by the acceptance or adoption of this act by any purchaser or purchasers of any such railroad, as above provided) be released and discharged from all their unpaid subscriptions which shall not have been previously settled or arranged by agreement or compromise; and provided, further, that all holders of such capital stock which shall have been paid up, and all creditors of any such railroad company, shall have the right to accept and avail themselves of any trusts, agreements, and provisions for recapitalization, for and during the period of six months from and after the passage of this act; and provided, further, that such corporation, when so formed and organized, shall, in suing and being sued, and in operating such railroad, be subject to the gen-

eral laws of this State not inconsistent with the original charter of said road and the amendments thereto.

Sec. 3948. *Power to issue bonds.* 4. Said corporation shall have power to make and issue bonds, bearing such rates of interest not exceeding seven per cent per annum, payable at such times and places, and in such amount or amounts, as it may deem expedient; and to sell and dispose of said bonds at such prices and in such manner as it may deem proper, to secure the payment of any bonds which it may make, issue, or assume to pay by mortgage or mortgages, or deed or deeds of trust of its railroad, or any part thereof, and of its real and personal property and franchises; and to act as a corporation. All property of said corporation included in such mortgage or mortgages or deed or deeds of trust, whether then held or thereafter acquired, shall be subject to the operation and lien of such mortgage or mortgages or deed or deeds of trust; and, in case of sale under same, it shall pass to and become vested in the purchaser or purchasers thereof, so as to enable them to form a corporation in the manner herein prescribed, and to vest in such corporation all the faculties, powers, authorities, immunities and franchises conferred by this act.

Sec. 3949. *Sinking fund—Preferred stock—Bondholders' votes.* 5. Said corporation shall have power to establish a sinking fund for the payment of its liabilities, and to issue capital stock to such aggregate amount as may be deemed necessary, not exceeding the amount named in the certificate of organization; may make preferred stock; make and establish preference in respect to dividends in favor of one or more classes of stock over and above other classes, and secure the same in such order and manner and to such extent as said corporation may deem expedient; and may confer upon the holders of any of the bonds which it may issue or assume to pay the right to vote at all meetings of stockholders (not exceeding one vote for each one hundred dollars of the par amount of said bonds), if deemed expedient; which right to vote, when once fixed, shall attach to and pass with said bonds, under such regulations as said corporation may prescribe, but shall not subject the holder to any assessment made by said company or to any liability for its debts, or entitle any holder thereof to dividends. *The said corporation shall have capacity to hold, enjoy, and exercise, within other States, the aforesaid faculties, powers, rights, franchises, and immunities, and such others as may be conferred upon it by any law of this State or of any other State in which any portion of its railroad may be situate, or in which it may transact any part of its business; and may hold meetings of stockholders and of its board of directors, and*

do all corporate acts and things without this State as validly, and to the same extent as it may do the same within this State, on the line of such road; and may make by-laws, rules, and regulations in relation to its business, and the number of its directors, and the times and places of holding meetings of stockholders and directors, and may alter and change the same as may be deemed expedient.

Sec. 3950. *Foreign corporation—Franchises.* 6. In case a portion of any railroad situated within this State (a part of which is situated in another State) shall become vested in a corporation of another State, the said corporation may exercise and enjoy within this State, and also in such other State for the purposes of such railroad and its business, all the rights, powers, faculties, franchises, and privileges in this act contained; and its mortgages and trust deeds shall operate and be binding as therein specified, and all sales under the same shall be valid and effectual.

Sec. 3951. *Purchase and consolidation of branch roads.* 7. Any railroad company incorporated under the provisions of this act shall have the power and authority to acquire, by purchase or contract, the road, road-bed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect the line of such railroad company, or any part of the same, or the use and enjoyment thereof, in whole or in part; may also purchase or contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining States; and may assume such of the debts and liabilities of such corporations as may be deemed proper. Upon purchasing any such railroad or railroads all the real and personal property of such corporations so purchased, and also the rights, powers, and franchises of the same, shall become vested in the railroad company so purchasing the same, together with all the rights, powers, privileges, and franchises conferred by the charters of the roads so purchased and all amendments thereto and the provisions of this act; and the company so purchasing and acquiring the title to or use of such railroad or railroads shall have power to complete, maintain, and operate the same. Any railroad company incorporated under the provisions of this act shall also have power to consolidate with other railroad corporations in the continuous line, either within or without this State, upon such terms as may be agreed upon by the corporations owning the same; and also shall have the power and authority to construct, equip, maintain, and operate branch railroads leading from the main line or from the termini of such railroad, from and to such points within this State or any adjoining State as may be deemed expedient; and in constructing the

same shall have the right to enter in and upon all lands; to survey routes; to receive donations of lands or moneys; to purchase and condemn lands required for the use of the road; to lay single or double tracks, and to cross all water-courses and public highways, not unnecessarily obstructing the same. In condemning lands for the use of such roads it shall have all of the rights and powers conferred upon such corporations by their charters and amendments and the general laws of this State. All railroads purchased and branch roads constructed, as aforesaid, shall be vested in and become a part of the property of the corporation so purchasing or constructing the same, as aforesaid; and shall be in all things governed by the laws, rules, and regulations governing the corporation purchasing or constructing the same, as aforesaid, and be operated as part of its line of road. Upon purchasing or constructing any railroad, as hereinbefore provided, the corporation purchasing or constructing the same shall have power and authority to issue new stock to such extent as may be considered advisable, and the same to dispose of as hereinbefore provided; to issue and sell bonds to such extent as may be deemed expedient, and to secure the same by mortgages and deeds of trust upon all the real and personal property, rights, powers, and franchises of any railroad so purchased, constructed, or in course of construction as hereinbefore provided: Provided, That the provisions of this act shall not be so construed as to authorize any railroad company organizing under the same to consolidate with or acquire, by contract or purchase, the road, road-bed, real and personal property, rights, and franchises of any railroad already built, equipped, and operated within the State of Indiana, and which may cross or intersect the line of the road of any company organizing under this act; but the powers of consolidation and purchase shall be and are hereby limited and restricted to such roads within the State of Indiana as may cross and intersect the same, and which have not been equipped and operated in whole or in part.

STATUTE OF INDIANA IN FORCE MARCH 8, 1883.

3951a. GUARANTY OF BONDS OF ANOTHER COMPANY. The Board of Directors of any railway company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the State in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and

interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining State, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

3951b. PETITION OF STOCKHOLDERS. 2. The petition of the stockholders specified in the preceding section of this act shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

3951c. LIMITATION OF THE POWER. 3. No railway company shall, under the provisions of this act, indorse or guarantee the bonds of any such railway company or companies, as is above mentioned, to an amount exceeding one half of the par value of the stock of the railway company so indorsing or guaranteeing as authorized under this act.

The Kentucky statutes are as follows:

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That the Louisville, New Albany & Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations, and authority to operate a railroad.

2. That the Louisville, New Albany & Chicago Railway Company is hereby authorized to purchase or lease for depot purposes, in the city of Louisville or county of Jefferson, such real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machine shops, and for all switches or turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used, or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same, and for all such purposes shall have the right to condemn all property required for the carrying out of the objects herein named, and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights, and franchises.

3. That said corporation shall have the power and right to condemn all property in the city of Louisville or county of Jef-

ferson, in this State, which may be deemed by it to be necessary for the purposes set out in this act; and that the proceedings for that purpose shall be instituted either in the Jefferson Court of Common Pleas or the Louisville Chancery Court, and shall be carried on, as nearly as may be, as actions at law by ordinary proceedings. Warning orders against non-residents, absent defendants, or unknown owners of property must be published three times in one of the daily newspapers published in said city of Louisville, State of Kentucky, the last publication at least ten days before the trial. The owners of distinct parcels of one contiguous tract may all be included in one proceeding, or any one or more of them holding contiguous tracts may be proceeded against in a separate action. The courts shall make all such rules, orders, and judgments as will secure a fair trial by an impartial jury of said city or county, and shall give proceedings upon its docket as soon as the parties are before the court and the issue made up. The jurors shall be sworn truly to ascertain and determine by their verdict the amount of compensation each owner will be entitled to if his land or property described in the petition be condemned. The court in which these proceedings are brought shall have power to assign a day for the trial of the case as soon as the petition is filed. Upon the return of the verdict, the court shall render judgment vesting title to the property described in the proceedings in said corporation, said judgment to take effect upon the payment into court by said corporation of the amount of money named in the verdict, within thirty days after the rendition of said judgment; and should said corporation fail to pay said money within said time, the said proceedings shall be dismissed without prejudice to other and subsequent proceedings.

4. This act shall take effect from and after its passage.

Approved April 8, 1880.

This act was afterwards amended, April 7, 1882, by an act entitled "An act to amend an act, entitled 'An act to incorporate the Louisville, New Albany & Chicago Railway Company, approved April 8, 1880:'"

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That the Louisville, New Albany & Chicago Railway Company is hereby authorized and empowered to endorse or guarantee the principal and interest of the bonds of any railway com-

pany now constructed, or to be hereafter constructed, within the limits of the State of Kentucky, and may consolidate its rights, franchises, and privileges with any railway company authorized to construct a railroad from the city of Louisville to any point on the Virginia line, such indorsement, guarantee, or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the State of Kentucky: Provided, It shall not lease or consolidate with any two lines of railway parallel to each other; or it may make such traffic arrangement or agreement with any such aforementioned road as its Board of Directors may deem proper.

2. This act shall take effect from and after its passage.

Approved April 7, 1882.

ARTICLES OF ASSOCIATION OF THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY.

"Know all men by these presents, That, whereas the New Albany and Salem Railroad Company was organized in the year A. D. 1847, under and in pursuance of a Public Act of the General Assembly of the State of Indiana, approved January 28, 1842; and under the provisions of said act and the amendments thereto, the said railroad company located and constructed a line of railway from the city of New Albany, in the county of Floyd, northwardly through the counties of Clark, Washington, Orange, Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, and Laporte, to Michigan City, all in the said State of Indiana and being of the length of about 288 miles.

"And whereas, the said corporation, as by law thereto authorized under its corporate seal executed and delivered to one Donn D. Williamson as trustee, two certain trust mortgages, embracing and conveying all and singular the said line of railroad, together with all its property, equipment, and appurtenances, and the franchise to maintain and operate the same and levy and collect tolls therefrom, which said mortgages were severally dated on February 8, 1851, and February 14, 1852, and were given to secure the payment of two issues of bonds which were executed and put into circulation for value by the said railroad company.

"And whereas, on the 24th day of October, 1859, the corporate name of said company was changed, under the authority of the Statutes of the State of Indiana, to the Louisville, New Albany & Chicago Railroad Company.

"And whereas, the said Donn D. Williamson, trustee as aforesaid, departed this life in the year 1869, and the duties, powers, and estate created and vested by the said two mortgages became vested in the alternate trustee named in the said two trust mortgages, viz., Charles E. Bill, of the City and State of New York.

"And whereas, on the 21st day of November, A. D. 1872, the said Charles E. Bill, being such trust mortgagee as aforesaid by the consideration of the Circuit Court of the United States within and for the district of Indiana, duly recovered a decree of foreclosure of the said two mortgages hereinbefore mentioned, and an order for the sale of the entire line of said railroad from New Albany to Michigan City as aforesaid, together with its property, equipment, and appurtenances of every description, and also the franchises to operate the same and levy and collect tolls thereon.

"And whereas, on the 27th day of December, A. D. 1872, all and singular the said line of railroad from New Albany to Michigan City inclusive as then located, constructed, and operated, including the right of way and the land occupied thereby, together with the superstructure and tracks thereon, bridges, culverts, fences, depot grounds and buildings thereon, engines, tenders, cars, tools, materials, machinery, furniture, and all other real and personal property appurtenant to the said line of road and used for the purpose of operating the same, together with the franchise to operate the same and levy and collect tolls therefrom under the original charter of said railroad company and the subsequent amendments thereto, was sold at the court-house door in the city of New Albany, Indiana, by John D. Howland, special commissioner, in due accordance with the requirements of said decree of November 21, 1872, and as provided by law, and was then and there purchased by George F. Talman, Frederick Schuchardt, James H. Banker, Moses Taylor, Edward Minturn, Charles P. Leverich, and John Steward, with the design of forming a corporation under the laws of the State of Indiana as is hereinafter stated.

"And whereas, the said John D. Howland, as such special commissioner, did on the said 27th day of December, 1872, execute, acknowledge, and deliver to said purchasers a deed of conveyance of all and singular the property so purchased by them as aforesaid, by virtue whereof the title to all said property and franchises has become vested in fee-simple absolute in the said purchasers who are subscribers hereunto.

"Now therefore, for the purpose of carrying out the design of the said purchase and forming a corporation of the State of

Indiana which shall of right possess and enjoy all the powers, rights, privileges, immunities, and franchises in respect to the said line of railroad so conveyed to and vested in the undersigned, which were at any time possessed and enjoyed by the said New Albany and Salem (lately the Louisville, New Albany & Chicago) Railroad Company, under its original charter and the amendments thereto, the said purchasers, under the authority and in connection with the provisions of the statutes of the State of Indiana in relation to the purchase of railroads, and especially under requirements of an act of the General Assembly of the State of Indiana, entitled 'An act to authorize, regulate, and confirm the sale of railroads, to enable purchasers of the same to form corporations and to exercise corporate powers, and to define their rights, powers and privileges; to enable such corporations to purchase and construct connecting and branch roads and to operate and maintain the same,' approved March 3, 1865, and a certain act supplemental thereto which was approved December 20, 1865, do by these Articles of Association, by them subscribed, form and constitute themselves into a corporation which shall be called

"THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,

"and the said corporation, by the name aforesaid, on the filing of these articles in the office of the Secretary of State, shall, by virtue thereof, have, possess, and enjoy the said line of railroad from New Albany to Michigan City, and all its appurtenances and equipments as specifically set out in the conveyance to the undersigned as the exclusive property of the said corporation hereby created, and the said corporation shall also have, exercise and enjoy all and singular the powers, rights, privileges, immunities, and franchises in respect to said line of railroad as completely in every respect as the same were held, exercised, and enjoyed by the said Louisville, New Albany & Chicago Railroad (formerly the New Albany & Salem Railroad) Company, under its original charter and the amendments thereto, and as the same were vested in the undersigned by the conveyance aforesaid.

"The number of directors shall be thirteen (13), and the following persons are constituted the first Board of Directors, to continue in office until the 1st day of January, 1874: George F. Talman, Moses Taylor, Frederick Schuchardt, James H. Banker, Edward Minturn, Charles P. Leverich, John Steward, James F. Joy, George S. Schuyler, John Jacob Astor, Roswell G. Rolston, Jonathan T. Wells, and Isaac Bell.

"The capital stock of the said corporation shall be and is hereby fixed at the sum of three millions of dollars, divided into thirty thousand shares of one hundred dollars each.

"In witness whereof the said incorporators have hereto set their hands and seals this 31st day of December, 1872.

"GEORGE F. TALMAN.	[Seal]
"FREDERICK SCHUCHARDT.	[Seal]
"CHARLES P. LEVERICH.	[Seal]
"JOHN STEWARD.	[Seal]
"MOSES TAYLOR.	[Seal]
"EDWARD MINTURN.	[Seal]
"JAMES H. BANKER.	[Seal]

"STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

"Before me, a Notary Public in and for said county and city, personally appeared the above-named incorporators, George F. Talman, Frederick Schuchardt, James H. Banker, Moses Taylor, Edward Minturn, Charles P. Leverich, and John Steward, and acknowledged the execution of the above articles of association as their act and deed for the purposes therein specified.

"Witness my hand and official seal this 2d day of January, 1873.

[Seal]

W. D. SEARLS, Notary.

"Box 406. Pa. 7.

"Articles of Association of the Louisville, New Albany & Chicago Railway Company. Received January 7, 1873. Office Secretary of State. Filed January 1, 1873.

"JOHN H. FARQUHAR."

The following facts were admitted and stipulated into the record by the parties thereto:

"It is agreed between the parties hereto that the contract between the Louisville, New Albany & Chicago Railway Company and the Ohio Valley Improvement & Contract Company filed with a bill of complaint herein and the endorsement of the bonds by the former of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, were executed upon the sole authority of the Board of Directors of the Louisville, New Albany & Chicago Railway Company, and that no petition of any of the stockholders of the said company requesting said endorsement in the manner

pointed out by Section 3951a, b, c of the Statutes of Indiana or in any other manner was ever signed or executed and no authority was conferred by said stockholders upon such directors, and such directors had only such authority as existed by virtue of their existence as such directors.

"It is further agreed that the guaranteed bonds referred to, numbered from 1 to 600 inclusive, were endorsed with such guarantee by the officers of the Louisville, New Albany & Chicago Railway Company on the — day of December, 1889; that 585 of such bonds, numbered from 601 to 1185 inclusive, were so endorsed and delivered on the 11th of March, 1890; that the regular meeting of the stockholders of the Louisville, New Albany & Chicago Railroad Company convened on the next day, March 12th, 1890, and no meeting had been held after the above contract of guarantee had been entered into until such regular meeting was held on the 12th day of March, 1890, and on which day, a majority of the board of directors were changed and such meeting then adjourned to the 22d day of March, 1890; that at such adjourned meeting the board of directors reported to the stockholders that the beforementioned bonds had been guaranteed and a resolution was adopted by a majority of all the outstanding stockholders objecting thereto and disclaiming any liability by reason of such guarantee."

ARGUMENT.

The real questions in this case are

I. Whether the "Monon" had any power to make the guarantee.

II. Whether that power was so exercised as to bind the "Monon" on its guaranty as to holders with knowledge of the facts, and

III. Whether the guaranty is binding as to *bona fide* holders for value and without notice.

The first point to be considered then is the source from which the "Monon" derives its power. This depends upon whether it is a corporation of the State of Indiana solely or also a corporation of Kentucky. The Court of Appeals held it to be a corporation of Kentucky as well as of Indiana, and that that holding is correct, we shall now attempt to show.

APPELLEE IS A KENTUCKY CORPORATION.

An examination of the act of 1880 shows, we think, a plain intention on the part of the State of Kentucky to create a Kentucky corporation. The title of the act declares it to be "an act to incorporate the Louisville, New Albany & Chicago Railway Company;" the body of the act gives it power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations. It gives the right to operate a railroad; the authority to purchase and lease real estate; the authority to connect with other roads or bridges then operated or to be operated in Kentucky; to build and operate connecting lines; authority to condemn land, with a special power and method of procedure; designates the courts in which it may proceed, and gives precedence in the trial of its condemnation cases.

These are very broad and unusual powers, and as well said by the Court of Appeals, "It may be too much to say that these are powers never conferred by the legislature of one State upon the corporation of another, but it is certainly true that they are powers more naturally and generally conferred by a State upon a body of its creation."

It is urged, however, by counsel for appellees that inasmuch as no provision is made for stock, stockholders, directors or corporate officers, the Kentucky act must be construed as a mere enabling act. This contention is met and well answered, we think, by the opinion of the Court of Appeals, in which Judge Taft says:

"It is true that there is no provision in the incorporating act for stock, and there are many provisions frequently made in the organization of new companies, by incorporating individual incorporators, which are here omitted; and if it is not in the power of a State to incorporate the corporation of another State by adoption, so to speak, then this act might very well be construed only to affect a license to the Indiana corporation to do the business and exercise the powers in the act named, in the State of Kentucky, so far as they may be consistent with its powers and limitations of power in its Indiana charter. Under such a construction the first section of the act, in so far as it attempts to create a Kentucky corporation, would have to be regarded as merely nugatory. But it is not true that one State may not incorporate a corporation of another State as such. It may be done, too, without any specific provisions for the stock or internal government of the new corporation. This is expressly settled by several decisions of the Supreme Court of the United States." Citing

Railroad v. Harris, 12 Wall. 65;
 Railroad v. Vance, 96 U. S. 450;
 Clark v. Bernard, 108 U. S. 436;
 Graham v. Hartford R. R., 118 U. S. 161.

A short review of those cases may not be amiss:

Railroad Company v. Harris was an action for personal injuries brought by Harris in the District of Columbia against

the Baltimore & Ohio Railroad Company. The court reviewed the legislation in regard to the company, and held that the acts of Virginia and the District of Columbia did not create a corporation, but that they were mere enabling acts, and that the Baltimore & Ohio Railroad Company was only a corporation of the State of Maryland, where it was originally chartered. The court, however, said :

“That there was no reason why several States can not by competent legislation unite in creating the same corporation or in combining several pre-existing corporations into a single one.” . . . “Nor do we see any reason why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own *quo ad hoc* any property within its territorial jurisdiction. The question is always one of legislative intent and not of legislative power or legal possibility.”

In *Railroad Company v. Vance*, 96 U. S. 450, it appeared that an Indiana corporation had leased the property and franchises of an Illinois corporation, that the lessee had by an act of the State of Illinois been confirmed in its lease and created a corporation of the State of Illinois. The court denied that this act was a mere license to the Indiana corporation to exercise its corporate powers and enjoy its corporate rights and privileges in another State, but said the Illinois act created the Indiana corporation an Illinois corporation. The Court said :

“We can not thus restrict the effect of the act, without disregarding wholly the ordinary meaning of the plain words of its second section, which declares that the lessees, their associates, successors, and assigns, *shall be a railroad corporation in the State of Illinois*. It does more : It gives the style by which that corporation shall be known. Still further, it does not authorize the complainant corporation to exercise in Illinois, the corporate powers conferred by the laws of Indiana ; but upon the corporation, which it declares shall be a railroad corporation in Illinois, it confers, by affirmative language, ‘the same or as large powers as are possessed’ by an Illinois corporation, the St. Louis, Alton & Terre Haute Railroad Company and, in addition, such

other powers as are usual to railroad corporations. The Indianapolis & St. Louis Railroad Company, as lessee of the St. Louis, Alton & Terre Haute Railroad Company, was thus created, by apt words, a corporation in Illinois. The fact that the corporation thus brought into existence and declared to be a corporation of Illinois by a law of that State bears the same name as that given to the Indiana corporation, can not change the fact that they are distinct corporations, deriving their existence from the separate and independent legislation of those States. . . But it may be suggested that the utmost which can be claimed for the act, is, that, without creating a new corporation in Illinois, it only made the complainant, as an Indiana corporation, a corporation of the State of Illinois. It was clearly competent for the General Assembly to have done this, as held in *R. R. Co. v. Harris*, 12 Wal. 82, where the court said: 'Nor do we see any reason why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quo ad* any property within its territorial jurisdiction.'

In the Kentucky Act, as in the Illinois Act, we find an express declaration that the Indiana corporation is made a corporation of its own State; we find also "that the style by which that corporation shall be known," is given, and "still further," the Kentucky Act "does not authorize the complainant corporation to exercise" in Kentucky "the corporate powers conferred by the laws of Indiana," but "by affirmative language" declares what the powers of the Kentucky corporation shall be. Judged by every rule laid down in *Railroad Company v. Vance*, the Kentucky Act is found to create a Kentucky corporation.

In the case of *Clark v. Barnard*, 108 U. S. 437, the *Harris* and *Vance* cases were approved and followed. It appeared that the Boston, Hartford & Erie Railroad Company was a corporation of the States of Massachusetts and Connecticut. It purchased the franchises and railroad of the Hartford, Providence & Fishkill Railroad Company, which was a consolidated corporation deriving its existence and powers from the States of Connecticut and Rhode Island. By an Act of the

Legislature of Rhode Island, this sale of the Hartford, Providence & Fishkill Railroad Company was confirmed, and the Boston, Hartford & Erie Railroad was by that name, given the right to enjoy the rights, privileges, and powers theretofore granted and belonging to the Hartford, Providence & Fishkill Railroad Company. Afterwards the Legislature of Rhode Island passed an Act amendatory to this one, by which was given to the Boston, Hartford & Erie Railroad Company the right to extend its line within the State of Rhode Island, upon condition that it would within a specified time execute a bond to that State in the penalty of \$100,000 to make the extension. The bond was given, but the company failed to extend the line, became bankrupt, and the State of Rhode Island claimed the money. It was urged that the agreement was *ultra vires*; that the directors of the Massachusetts and Connecticut corporation had no right to apply for or receive grants from the legislature of Rhode Island. The court said:

"It is now argued by counsel for the appellees that the party which, in all these transactions, was dealing with the State of Rhode Island was the Boston, Hartford & Erie Railroad Company, in its character as a corporation of the State of Connecticut; that, as such, it had no power, under the charter granted by that State, to build or own a railroad directly connecting Boston and Providence, nor had it, as such, any capacity to receive a grant of such a franchise; that, consequently, every thing done or attempted in that behalf was *ultra vires* and void.

"But the Boston, Hartford & Erie Railroad Company was also a corporation of Rhode Island. As such it owned and operated a railroad within that State, and had received and exercised franchises under its laws, to which it was in all respects subject. It was the assignee of the road and rights connected therewith, formerly belonging to the Hartford, Providence & Fishkill Railroad Company; and it was this corporation, dwelling and acting in Rhode Island, that the legislature by the act in question, authorized to exercise the additional powers it conferred.

"If it had had no previous existence as a corporation under the laws of Rhode Island, it would have become such by virtue of the act in question. For although as a Con-

necticut corporation it may have had no capacity to act or exist in Rhode Island for these purposes, and no capacity by virtue of its Connecticut charter to accept and exercise any franchises not contemplated by it, yet the natural persons, who were incorporators, might as well be a corporation in Rhode Island as in Connecticut, and by accepting charters from both States could well become a corporate body, by the same name and acting through the same organization, officers, and agencies in each, with such faculties in the two jurisdictions as they might severally confer. The same association of natural persons would thus be constituted into two distinct corporate entities in the two States, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common either as to name, capital, or membership. Such was in fact the case in regard to this company, so that in Rhode Island it was exclusively a corporation of that State, subject to its laws and competent to do within its territory whatever its legislation might authorize.

"Nor do we see any reason (as was said by this Court, Mr. Justice Swayne delivering its opinion, in *Railway Company v. Harris*, 12 Wall. 65-82) why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quo ad* any property within its territorial jurisdiction. That this may be done was distinctly held in the *Ohio & Mississippi Railroad Company v. Wheeler*, 1 Black, 297. The same view was taken in *Railway Company v. Whitton*, 13 Wall. 270, in *Railroad Company v. Vance*, 96 U. S. 450, and in *Memphis & Charleston Railroad Company v. Alabama*, 107 U. S. 581. *The question of the powers of the Boston, Hartford & Erie Railroad Company, as a corporation in Rhode Island, and the legal effect of its acts and transactions performed in that State, is to be determined exclusively by the laws of that State, and not by those of Connecticut, which have no force beyond its own territory. It results, therefore, that the doctrine of ultra vires, as here urged by the appellees, has no place in this controversy.*"

In *Graham v. Boston, Hartford & Erie Railway Company*, 118 U. S. 161, the Supreme Court considered an act of New York quite similar in effect to that of Rhode Island considered in the case of *Clark v. Barnard*. The New York Legislature there authorized the Boston, Hartford & Erie to purchase the

franchises and property of two other corporations and to exercise the rights, privileges, and franchises of such corporations. The Supreme Court said :

“As a purchaser of what this act authorized to be sold to it, the company purchasing became a New York corporation by its then existing name.”

It then cites with approval the cases of *Clark v. Barnard and Railroad Company v. Harris*.

The following cases recognize the same doctrine:

Pennsylvania Company v. St. Louis Company, 118 U. S. 296.
Martin v. B. & O. Railway Company, 151 U. S. 677.
Markwood v. Southern Railway Company, 65 Fed. Rep. 823.
The Western & Atlantic R. R. Co. v. Roberson, 22 U. S. App. 187 (61 Fed. R. 593).

Counsel for appellees insist, however, that the case of *Railway Company v. James*, 161 U. S. 545, either relieves these cases of the interpretation and force given them by the Court of Appeals, or directly overrules them, and by an ingenious patchwork of different parts of the Court's opinion, seek to sustain their contention. Thus on page 27 of their brief, they say

“The Circuit Court of Appeals held that this court decided (*R'y Co. v. James*) that the

“‘Missouri company might be a corporation of Arkansas by virtue of the statute making it such,’ etc.

“It is clear that that Court either overlooked or misinterpreted the following clear and unambiguous language of this court (p. 564): •

“‘It is therefore obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas companies did not convert it into an Arkansas corporation’; that ‘it would be necessary to create it out of natural persons whose citizenship of the State creating it could be imputed to the corporation itself.’”

Counsel have here knowingly taken a part of the opinion dealing with the Arkansas Act of 1881, and separated it by the word “that” of their own coinage, from a part of the opinion

relating to the Arkansas Act of 1889 and made it to appear that this Court decided that a corporation could only be created by incorporating natural persons. If we have read aright the decision in *R'y Co. v. James*, this Court did not decide that only by incorporating natural persons, can a corporation be created, but that as *regards the question of citizenship*, a corporation is deemed to be a citizen of the State first creating it, and that this presumption is conclusive, and where such a corporation is subsequently incorporated as such by another State, it does not thereby become a citizen of the second State, but though a corporation of the second State, and as such subject to its laws, its citizenship remains that of the State first creating it.

Again, on page 30 of their brief, counsel say that the doctrine is

“Finally and fully announced in *Railway v. James*, that a State can not create a corporation out of a corporate incorporator of another State; that a State can only incorporate the natural persons who may be the incorporators of a foreign corporation, and thereby create a distinct corporation by its own legislation. Judge Shiras, in delivering the opinion of the court (*Railway v. James*) and in defining the requisite material for incorporators, said: ‘In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself.’”

If counsel had seen fit to observe the language that immediately precedes and that which follows the above extract, they had seen that the court refers to the provision of the Federal constitution relating to the jurisdiction of Federal Courts as dependant on citizenship, and that the court decided not what counsel so confidently assert but only that as regards jurisdiction the corporate incorporator of the second State, retains its original citizenship though it has become a *corporation* of the second State. That we may correct the false impression sought to be given by these skillfully selected extracts, we give the following language of the court.

On page 562, the Court said :

" We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one State indisputably taken for the purpose of Federal jurisdiction, to be composed of citizens of such State, is authorized by the law of another State to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second State, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the State of the original creation.

" We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that State corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

The Court, after setting out the provisions of Section 5 of the Arkansas Act of 1881, then says :

" It was under the provisions of this section that the St. Louis & San Francisco Railroad Company in 1882 purchased from corporations of Arkansas the railroad already built by them, extending from the southern boundary of Missouri to Ft. Smith in Arkansas. These Arkansas corporations have since maintained their separate organizations as corporations of that State, but do not operate railroads. It is therefore obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas companies did not convert it into an Arkansas corporation. The terms of the statute show that it merely granted rights and powers to an existing foreign corporation, which was to continue to exist as such, subject only to certain conditions—among others, that of keeping an office in the State, so as to be subject to process of the Alabama courts.

" It is true that by the subsequent Act of 1889, by the proviso to the 2d section, it was provided that every railroad corporation of any other State, which had theretofore

leased or purchased any railroad in Arkansas, should within sixty days from the passage of the act, file a certified copy of its articles of incorporation or charter with the Secretary of State, and shall thereupon become a corporation of Arkansas, any thing in its articles of incorporation or charter to the contrary notwithstanding: and it appears that the defendant company did accordingly file a copy of its articles of incorporation with the Secretary of the State. But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we can not concede that it availed to create an Arkansas corporation out of a foreign corporation *in such a sense as to make it a CITIZEN of Arkansas within the meaning of the Federal Constitution so as to subject it as such to a suit by a citizen of the State of its origin.* In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as construed by the decisions of this Court, it would be necessary to create it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Arkansas, were by the legislation in question created a corporation, and that therefore the citizenship of the individual corporators is imputable to the corporation."

It is contended, however, by counsel for appellees (Brief p. 34), " that without legislative authority and consent of Indiana, the Indiana " New Albany " could not enter into a charter contract with the State of Kentucky, and could exercise no powers in Kentucky which it could not exercise at home."

Our answer is twofold: First, that full power is given the Indiana corporation by Sec. 3949 Rev. Statutes of Indiana to accept the Kentucky charter, and that second: Having acquired Kentucky property, rights and privileges from the State of Kentucky, it will, as far as its Kentucky property is concerned, be held bound by the Kentucky Act irrespective of the Indiana law.

Sections 3945 to 3951 inclusive of the Revised Statutes of Indiana relate to and govern corporations created and organized as the " Monon " was. A reading of those sections and the original Articles of Incorporation of the " Monon " shows this so plainly as to need no further comment.

Now Section 3949 of those statutes provides, among other things, that

"The said corporation shall have capacity to hold, enjoy, and exercise, within other States, the aforesaid faculties, powers, rights, franchises, and immunities, and such others as may be conferred upon it by any law of this State OR OF any other State in which any portion of its railroad may be situate, or in which it may transact any part of its business."

Counsel quote this part of the section on pages 34 and 35 of their brief, and, we trust by inadvertence, have replaced the words "or of" which we have printed in heavy type, by the word "in," which changes the entire meaning of the paragraph, and gives some color to the argument there presented.

The statute so conclusively shows the power to accept the Kentucky Act to exist that we do not feel warranted in further discussing the point.

As to the binding effect of the Kentucky Act irrespective of the statute law of Indiana, as regards property situated in Kentucky, we desire only to refer the court to the case of *Clark v. Barnard*, 108 U. S. 436, and to page 21 of this brief, where we have discussed the case and quoted from the opinion rendered.

It will be seen that the same contention was made there as here, and the court's answer there applies with equal force to the case at bar.

THE CONSOLIDATION OF THE INDIANA "NEW ALBANY" WITH
AN ILLINOIS CORPORATION IN 1881, EVEN IF VALID,
DID NOT DESTROY THE KENTUCKY CORPORATION.

Two years after the passage of the Kentucky Act creating appellee a Kentucky corporation, the Legislature of Kentucky passed an act amending it, by which full power was expressly given appellee to make the guaranty in question. The Louisville, New Albany & Chicago Railway Company had, however, a year prior to this second Kentucky Act attempted a consolida-

tion with a corporation of Illinois, the consolidated company retaining the old name of the Indiana constituent. We shall not discuss the very serious question of the validity of that consolidation, leaving it to associate counsel, but desire to refer this Court to the case of *American Loan & Trust Co. v. Railway Co.*, 157 Ill. 641, where the Supreme Court of that State held the consolidation to be void. Assuming the consolidation to be valid, let us examine the contention of counsel for appellee. It is urged that even if the Kentucky Act of 1880 created the "New Albany" a Kentucky corporation, yet by virtue of this consolidation, the Kentucky corporation, not being mentioned as a party to the articles of consolidation, ceased to exist, and there was no such corporation for the Kentucky Legislature in 1882 to grant additional powers to. Just how this Kentucky corporation dissolved itself into thin air is not explained by counsel. It is manifest that it could only cease to exist by virtue of its own act and an acquiescence of the State of Kentucky in its dissolution. Neither of these things ever occurred. It was never for a moment contemplated by the "New Albany" company when it consolidated with the Illinois company that its Kentucky charter should be destroyed. Article 3 of the Contract of Consolidation provides that

"The said consolidated corporation hereby created shall be vested with all the rights, privileges, immunities, and franchises which usually pertain to railroad corporations under the laws of the respective States of Illinois and Indiana, wherein the lines of its railroad are situate, *and shall also be vested with all and singular the rights, powers, privileges, immunities, capacities, and franchises which before the execution of these articles was lawfully possessed or exercised by either of the parties hereto.*"

By Article 9 it was provided that the principal place of business and general office of the consolidated corporation should be established in *the city of Louisville, Kentucky.*

It is apparent that one of the franchises possessed by the Indiana corporation was a franchise of existing as a Kentucky

corporation, and by the terms of consolidation that franchise passed into and became a part of the consolidated corporation. The Court of Appeals puts the case in this strong way:

"We do not perceive that this consolidation creates any difficulty. The Kentucky corporation having been once established could not die except by its own act or that of the State which gave it being. Every thing it had acquired in the way of property remained in it after the consolidation of its constituent with the Illinois corporation. It was not and could not be ousted of its franchise thereby. The Kentucky corporation when incorporated, was intended by the Legislature of Kentucky to be under the same organization and the management as the Indiana Company. When the incorporators of the Indiana Company added others to their number by virtue of the laws of Indiana, and to this extent changed the management, the franchises which the incorporators had obtained by the incorporation of the old company in Kentucky were simply transferred by express provision of the articles of consolidation to the new organization. If it were necessary to have such a transfer approved by the Kentucky Legislature, we have it recognized and approved in the act of April 7, 1882, in recognizing and adding to the powers of the Kentucky corporation which was then being managed by the consolidated corporation of Indiana and Illinois."

THE KENTUCKY ACTS WERE ACCEPTED BY THE CONSOLIDATED NEW ALBANY COMPANY.

That the Consolidated New Albany Company never doubted that the Kentucky charter still existed and that it possessed all the powers and privileges thereby created is shown by innumerable of its acts, among others the following:

1. It executed on March 24, 1884, a deed of trust to the Farmers Loan & Trust Company as a corporation created and existing under the laws of the State of Indiana and *Kentucky*.
2. It executed a deed of trust, of date January 1, 1886, to the same Trust Company as a corporation of the State of Indiana and *Kentucky*.

3. It instituted condemnation proceedings in the County Court of Jefferson County, Kentucky, on February 25, 1887, under and by virtue of the power granted it by the *State of Kentucky*.

4. In the case of *Lizzie Woods v. The L. N. A. & C. R. R. Co.* the New Albany Company removed the case from the State Court of Indiana to the Federal Court for the District of Indiana upon the ground that it was a *Kentucky* corporation.

5. It executed a lease with The Louisville Southern Railroad on December 7, 1888, wherein it describes itself as a corporation of the States of Indiana and *Kentucky*.

(As to all these acts, see Stipulation, Tr. 65-7.)

Having shown, as we believe, that the "Monon" is a Kentucky corporation, it is plain that the Kentucky Act of 1882 gave it the right and power to make the guaranty on the Beattyville bonds. It remains then to ascertain whether that power was so exercised as to bind the "Monon" as a Kentucky corporation.

THE DIRECTORS OF THE "MONON" UNDER THE POWER
GRANTED BY THE KENTUCKY ACT OF 1882 HAD
THE RIGHT TO MAKE THE GUARANTY.

We believe it to be well-settled law that where the management of a corporation is vested in a board of directors, as in the case of railroad companies, such board, in the absence of express limitation, possess all the powers of the corporation. Thus it has been held that the Board of Directors may issue negotiable paper, execute mortgages, make contracts, leases, and perform all acts which do not involve an organic change in the corporation. We shall not attempt a general discussion of the authorities, as the law is plain, but content ourselves by referring the Court to the following text-writers and decisions where the rule is plainly set out:

Thompson on Corporations, §§ 3970, 3985;
 2 Cook on Stockholders, §§ 708, 709, 712, 808;
 1 Morawetz on Private Corporations, § 516;
 1 Wood Railway Law, § 151;
 Hoyt v. Thompson's Executor, 19 N. Y. 216;
 L. E. & St. L. R'y v. McVey, 98 Ind. 393;
 Thompson v. Natchez W. & S. Co., 68 Miss. 423;
 Hodden v. K. & G. R. R. Co., 7 Fed. Rep. 796;
 Wood v. Welen, 93 Ill. 153;
 Hendee v. Pinkerton, 96 Mass. 387;
 Beveridge v. N. Y. E. R. R. Co., 112 N. Y. 1;
 Flagg v. Manhattan Railroad, 10 Fed. Rep. 431;
 Nashua R. R. Co. v. Boston R. R. Co., 27 Fed. Rep. 825;
 Same case on appeal, 136 U. S. 384;
 McCulloch v. Moss, 5 Denio, 575;
 Moses v. Tompkins, 84 Alabama, 613;
 Dana v. Bank of United States, 5 W. & S. 223;
 Hudson v. Green, 91 Missouri, 367;
 Gashwiler v. Willis, 33 Cal. 11;
 Conro v. Fort Henry Iron Co., 12 Barbour, 27.

The rule giving directors the powers of the corporation is, however, subject to an exception where the power claimed, if exercised, would work an organic or fundamental change in the company. (*Railway Company v. Allerton*, 18 Wall. 233.) That the power conveyed in the Act of 1882 is not within this exception, is, we think, plain. The power to guarantee the bonds of another road is a very important one, but so also is the power to lease another road, to mortgage its own road which creates a debt of a higher dignity than a guaranty, and yet these last powers have uniformly been held, in the absence of express provision, to be lodged in the board of directors. In the Kentucky Act we find the directors are given the authority expressly to make such traffic arrangement or agreement with the road whose bonds they are authorized to guarantee. Is it reasonable to suppose that the directors are given the primal and important power of making the agreement which shall be the consideration for the guaranty, and are not given the power to make the mere guaranty itself?

It is said that by virtue of the Indiana law of 1881 (Section 3951a, b, c,) the action of the stockholders is made necessary to a valid guaranty.

We answer that Kentucky gave the power without that restriction, a year prior to the enactment of the Indiana law, and the latter State can not restrict the power of the Kentucky corporation. (Clark v. Barnard, *supra*.)

Trusting that we have established the liability of the "Monon" as a Kentucky corporation on its guaranty, we shall now discuss the question of its liability as an Indiana corporation.

APPELLEE AS AN INDIANA CORPORATION HAD
THE POWER TO MAKE THE GUARANTY, AND
AS TO BONA FIDE HOLDERS WITHOUT
NOTICE, IS LIABLE FOR SUCH
GUARANTEED BONDS.

We shall not discuss the right and power of appellee to make the guaranty by virtue of any statute of Indiana other than the statute of 1883, Section 3951a, b, c, as those branches of the case are fully covered by the brief of associate counsel. Indeed we feel an inability to present any argument as to the liability of appellee under that section which can add to the exceedingly able opinion of Judge Taft. We shall endeavor, therefore, to avoid a repetition of what is there stated, and to simply supplement it by a brief argument, considering first

THE POWER OF APPELLEE'S BOARD OF DIRECTORS UNDER
SECTION 3951a, b, c, TO MAKE THE GUARANTY.

The language of the statute on this point is conclusive. It is as follows:

"That the *Board of Directors* of any railroad company organized under and pursuant to the laws of the State of Indiana whose line of railway crosses the State in either direction, *may*, upon the petition of the holders of a majority of the stock of such railroad company, *direct* the execution by such railroad company of an *indorsement guaranteeing* the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining State," etc.

Here the power is directly conferred on said Board of Directors, and on no one else, to cause said guaranty to be endorsed on the Beattyville bonds. It is true that said power is conferred,

coupled with a condition, but nevertheless the *power*, we shall seek to show, is conferred, and the power and the condition upon the fulfillment of which it is to be exercised are separate and distinct things. The power may or may not be rightfully exercised, while the condition remains wholly unfulfilled. While the condition may be fully complied with, that is, in this case, the requisite number of appellee's stockholders might present the required petition to the Directors, and still the Board of Directors could not rightfully execute any guaranty unless the *power* was delegated to them so to do.

It is insisted by counsel for appellee that the *power* in this case was so connected with the condition upon which it could be exercised that the one could not be legally exercised without the previous compliance with the condition, or rather, that there was no delegation of power that did not embrace the fulfillment of said condition. If this was so, then the action of the board of directors without the performance of the precedent condition, would be absolutely void, and being so, no subsequent ratification or acquiescence could give it validity. This court has, however, held to the contrary in the case of *Zabriskie v. The Cleveland, etc., Railroad Company*, 23 How. 381.

That the power can be wholly separated from the condition, so that the former may be exercised while the latter is wholly uncomplished with, is well illustrated by the case of the *Royal British Bank v. Turquand*, 6 Ellis & Blackburn's, 327—a case on the authority of which, this Court rested the case of the *Commissioners of Knox County v. Aspinwall*, 21 How. 539-546.

The Court will recollect that the action in that case was upon a bond against the defendant as the manager of a joint stock company. The defense was want of power under the deed of settlement or charter to give the bond, one of the clauses in the charter providing that the Directors might borrow money on the bonds in such sums as should from time to time, by a general resolution of the company, be authorized to be borrowed. The resolution that was passed was considered defective.

The Court, Jarvis, Ch. B., said :

"We may take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are bound to do no more. And the party here, in reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, in the face of the document appeared to be legitimately done."

Here it is conceded that the resolution, on the passage of which depended the rightful exercise of the power to borrow money, was not passed, and yet the power was exercised and the court said it was exercised so as to bind the company. Here the power is separated from the condition, which was not fulfilled. The power was known to exist, but the fulfillment of the condition was supplied by the presumption that it had been fulfilled, arising from the borrowing of the money.

We next call attention of the court to said case of the Commissioners of Knox County v. Aspinwall, based on said English case of the Royal British Bank v. Turquand, which case was decided in 1859, and has never been overruled, nor has the British case been ~~deemed~~^{decided} as applied to a private corporation.

After determining that the commissioners had conclusively *decided*, by their recital on the bonds, that the preceding ~~ing~~^{ent} condition had been complied with so as to bind the corporation and protect the *bona fide* holders of the bonds, the court proceeds to say and decide as follows:

"Another answer to this ground of defense is that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of power, had been obtained from the fact of the subscription by the board to the stock of the railroad company and the issue of the bonds."

In this case it is conceded, as a matter of fact, by the Court that the prescribed preliminary condition had not been complied

with, and yet the court held that the power was rightfully exercised notwithstanding, as to the *bona fide* holder of the bond, the purchaser having a right to assume that the vote of the county had been taken.

The County of Pendleton v. Henry Amy, 13 Wall. 297, was a suit by the purchaser of some bonds issued by the county of Pendleton in payment of its subscription to the capital stock of the Covington and Lexington Railroad. The defense was *want of power* in the county to issue the bonds; that although the legislature authorized the county to subscribe to said capital stock and issue bonds in payment of same, yet the authority was coupled with a proviso that the real estate holders residing in the county should so vote by a majority at such times as the County Court might appoint. No such vote was taken. The court said:

"Without legislative authority, a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company and bind itself to pay its subscription or issue its bonds in payment, and, if it does, the purchaser of such bonds is affected by the want of authority to make them.

"But," say the court, "it does not follow from this that when the legislature *has given its sanction* to the issue of bonds, provided that before their issue certain things shall be done by the officers or the people of the county, the bonds can be avoided in the hands of an innocent purchaser by proof that the county officers or the people have not done, or have insufficiently done the things which the legislature required to be done before the authority to subscribe or to issue bonds should be exercised. A purchaser is not always bound to look further than to discover that the *power* has been conferred, although coupled with conditions precedent.

"When, therefore, they make a subscription and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled."

That is to say, the purchaser of the bonds must know before he purchases that the *power exists* for their issue, but that being

so, he will under certain conditions be protected, though the precedent conditions have not been complied with. We are well aware that in the municipal bond cases this court has held that there must be a recital on the bonds in order to protect the innocent holder for value where the condition has not been complied with, but the fact that there can be an estoppel in any event, of necessity determines that *power* exists in the absence of the fulfillment of a precedent condition.

If we have sustained our contention that *power* existed in the Board of Directors of appellee to make the guaranty even though the precedent condition of a stockholders' vote was not complied with, it remains but to examine whether the power was so exercised as to bind appellee in favor of *bona fide* holders without notice.

We readily admit that, not considering appellee's power to make the guarantee as derived from other statutes, any person with knowledge of the absence of action on the part of the stockholders can not hold the appellee on its guaranty.

We insist, however, that the guaranteed bonds in the hands of *bona fide* holders for value without notice are valid obligations of appellee. It is doubtless unnecessary to cite authority in support of the proposition that the Beattyville bonds are commercial paper. We, however, refer the court to

Burroughs on Public Securities, page 229 ;
 Daviess County v. Hindekoper, 8 Otto, 98;
 Moran v. Miami County, 2 Black. 722.

Likewise the guaranty endorsed on the bonds is negotiable.

Killian v. Ashby *et al.* 24 Ark. 511 ;
 Cooper & Peabody v. Diedrick, 26 Wend. 430 ;
 Bartridge v. Davis, 20 Vt. 497 ;
 Webster v. Cobb, 17 Ills. 166 ;
 Jackson v. Foote, 12 Fed. Rep. 37 ;
 Studebaker v. Cady, 54 Ind. 586 ;
 Davis v. Wells, Fargo & Co., 104 U. S. 690 ;
 Toppan v. C. C. & C. R. R. Co., 1 Flippin, 74.

The weight of the above cited authorities is materially supplemented by the form and purpose of said guaranty :

1. It is in form negotiable, made payable to the "holder" thereof, which is the same as though payable to bearer.

2. The guaranty is endorsed on negotiable bonds having thirty years to run to maturity.

3. Said bonds and the guaranty endorsed thereon were intended to be sold in the open market to raise money thereby with which to build and equip the Beattyville road. Now, with what intent were said guarantees made, and with what intent received, except that thereby (for that has much to do with the character of the instrument) an obligation of payment should be created on the part of the guarantor that should accompany said bonds into the hands of any and all successive lawful holders thereof until the bonds and each coupon attached thereto should be paid, partaking all the time of the negotiable character of the bonds on which it was endorsed?

The bonds and guarantee thereon being negotiable and giving to the holder all the rights that pertain to commercial paper, we insist that

THE POWER IN THE BOARD OF DIRECTORS TO MAKE THE
GUARANTEE, WAS SO EXERCISED AS TO BIND THE
APPELLEE IN FAVOR OF BONA FIDE HOLD-
ERS OF SAID GUARANTEES.

In the case of *Battles & Webster v. Lendenschlager*, 84 Penn. St., the court tersely states the law thus: "The latest decisions, both in England and in this country, have set strongly in favor of the principle that *nothing* but *clear evidence* or knowledge or notice, fraud or *mala fides* can impeach *prima facie* title of a holder of negotiable paper taken before maturity."

In the case of *Storey v. American Life Insurance Co.*, 11 Paige Ch. R. 635, the court said:

"The negotiable security of a corporation which, upon its face, appeared to have been duly issued by such corporation and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was in fact issued for a purpose, and at a place not authorized by the charter of the company and in violation of the laws of the State where it was actually issued."

We call attention to an extract from the opinion in the case of the Farmers National Bank v. The Sutton Manufacturing Co., 52 Fed. Rep. 191, which is as follows :

"If the extrinsic fact upon which depends the lawful character of the act is one peculiarly within the knowledge of the general agent of the corporation by whom the act is done, the act itself is an implied representation that the necessary facts exist, the truth of which the corporation is estopped to deny against any person who in dealing with the corporation has parted with value on the faith of it. *The principle has been frequently applied in cases of commercial paper issued in the name of the corporation by its officers having general authority to issue such paper.*"

The following cases illustrate the same rule :

Farmers & Mechanics Bank v. Butchers & Drovers Bank, 16 N. Y. 125.

Bissell v. Railroad Cos., 22 N. Y. 289.

Wright v. Line Co., 101 Pa. St. 204.

Water Co. v. DeKay, 36 N. J. Eq. 548.

Credit Co. v. Howe Mach. Co., 54 Conn. 357.

Gelpcke v. City of Dubuque, 1 Wall. 203.

Genessee Co. Sav. Bank v. Mich. Barge Co., 52 Mich. 438.

Bird v. Dagget, 97 Mass. 494.

Bank v. Young, 7 Atl. Rep. 488.

Mich. Bank Ass. v. N. Y. & S. White Lead Co., 35 N. Y. 505.

We have cited all the authorities that it seems to us necessary in support of the proposition that the bonds and guaranty being negotiable, *bona fide* holders of such have a right to rely for their protection on the fact of the existence of the *power* to make said guarantees, and are not affected with the failure of the performance of the precedent condition.

THE GUARANTY VALID AS THE ACT OF APPELLEE'S AGENT.

The court will indulge us now for a short time, in our attempt to show, by abundant authorities, that the liability of appellee to our clients on the guarantee endorsed on their bonds is also fixed by the application to the facts of the case of the principles of the law of agency.

When we speak of the principles of the law of agency controlling this case we mean those principles as applied to private corporations, and not those principles as applied to municipal corporations. The distinction is marked between the liability of a private corporation for the acts of its agents and the liability of the municipal corporation for the acts of its officers. Overlooking or disregarding this difference, counsel for appellee ascertaining, as they thought they had, that in the courts of the United States it had been held, as to municipal bonds, that the *bona fide* purchaser of such bonds did not acquire a good title by his purchase, unless he first ascertained that the previous condition to the exercise of the *power* to issue the bonds had been complied with; or that said bond was subject to the municipal decision, contended that the same doctrine should be applied to the exercise of the *power* of private corporations to issue bonds; and, hence, inasmuch as the directors in this case, before the preliminary condition had been fulfilled, issued the bond, said bonds, as they concluded, must be null and void.

Had they considered the difference in the relation between the agents of a private corporation and their principal, and the officers of a municipal corporation and the corporation, they could not have fallen into such gross errors.

We know that a private corporation is invested with certain power to be exercised for a certain purpose, having reference to profits to its stockholders, that these powers must be exercised and these purposes accomplished by and through agents, and these agents are human beings subject to infirmity and liable to

err, innocently and ignorantly, or with evil design, and still their acts, done within the *apparent* scope of their authority, will bind the principal.

These private corporations have no records that the public have a right to inspect, and no certain way of ascertaining whether a precedent condition to the exercise of a power has been fulfilled.

Any damage arising from the unauthorized acts of the directors of private corporations falls alone on the corporation, whose agents they are, and not on the public, whose agents they are not.

The agents are not officers of the law, whose powers and duties are defined by statute, nor ^{are} ~~or~~ the records of their proceedings public records required by law to be kept. While a municipal corporation is a government agency, its agents all public officers, whose powers and duties are fixed and defined by public law, accessible to all, and they can do only what the law expressly empowers them to do, and that law being accessible to all, all who deal with these officers or agents can know, and should be held bound to know, whether they are discharging their duties as prescribed and defined by law, and the purchaser of a municipal bond will be protected in his purchase of such bond only when, as a matter of fact, the precedent condition has been complied with, or when the corporation has estopped itself from saying that the condition has not been fulfilled by the recital on the bonds that it has.

The acts of these officers, agents, are made matters of public record, to which records all persons have access, and hence, as to the purchaser of a municipal bond, on which there is no recital indorsed, there can be no excuse for not examining these records, and his bonds will be held invalid if, on such examination, he does not find the condition complied with.

This difference between public and private corporations is thus spoken of and considered by the authorities:

In 72 Ill. 604, Chief Justice Walker said :

"It has been uniformly held by this court that inasmuch as municipal corporations are created for governmental purposes and not for business purposes, when such a body is empowered to enter into trade or enterprises of a private character there are no *presumptions* in such acts; but in their performance it *must appear* that the law has been strictly complied with before the performance of such act will be enforced by the law."

Such rule does not apply to this case.

In private corporations the question is not whether, as to the liability of the principal, all the requirements of the law have been complied with by the agent, but whether the principal had power to perform the acts that have been done by the agents within the line of their employment.

In the case of *Humbolt Township v. Long*, 2 Otto, 642, Mr. Justice Miller, commenting on the case of the *Royal British Bank v. Turquand*, says :

"The bank in that case was not a corporation, it was a joint stock company in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money.

"This power depended, in this particular case, on a resolution of the company—the charter or deed of settlement gave the power, and when it was exercised the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient.

"This was a private partnership. Its papers and records were not open to public inspection—the manager and directors were not officers of the law, whose powers were defined by statute, nor was the existence of the condition on which the power depended to be ascertained by the inspection of public and official record made and kept by officers of the law for that very purpose. In all these material circumstances that case differed widely from the case before us."

In *Eastern Railway Counties v. Hawks*, 4 H. L. Cas. 331, 373, it is said :

"There is a broad difference between private corporations and public, municipal corporations in reference to the doctrine of *ultra vires*, or want of power. In the case of

private corporations, or corporations not municipal, the tendency of the court is to restrain the doctrine of *ultra vires* to clear cases of excess of power *with the knowledge of the other party*, express or implied, from the nature of the corporation and of the contract entered into." (*Do.* 366.)

In its application to municipal corporations, the rule is much more rigid. (*Do.* 367.) In *Monumental National Bank v. Globe Works*, 101 Mass. 57, Hoar, Justice, held :

"That the officers of such corporations (municipal) can not, like the officers of a private corporation, by their own act, create an estoppel against its tax-payers and people so as to render illegal issues of ordinary city drafts or vouchers, not authorized by law, valid in the hands of holders for value—such holders are affected with the notice of the illegality."

Many more authorities might be cited on this point, but it is deemed unnecessary to cite more. Enough has been cited, we trust, to show that the difference between the powers and duties of the officers of a municipal corporation and the relation of said officers to the corporation are so different from the powers and duties of the agents of a private corporation, and their relation to such corporation, that the principles which control the acts of said officers would not, in many cases, and in this case, control or be applicable to the acts of said agents.

Hence, we say that the authorities relied on by appellee do not apply to the acts of the directors in making the guarantees in this case. But we are governed by, and confidently rely on, the decisions that pertain to private corporations alone—where there is *discretion* and *presumption* in the agents.

We insist that the directors in this case were not agents in the ordinary sense of the word, but were practically the corporation itself, yet technically they were not the corporation, and are in a sense agents, hence we treat them as agents of the corporation.

Now what is the law of private corporations to be applied to this case? To what extent do the wrongful acts of an agent of a private corporation bind the corporation in fraud of a *bona fide* holder, for value, before maturity?

In Green's Brice's *Ultra Vires*, p. 344, it is said "Corporations can be made liable for the frauds of their agent only when acting within their authority, express or implied."

The author then asks the question, "What frauds are within an agent's authority to commit?" For answer to it he refers to the opinion of the Privy Counsel in the case of *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394-411, in which it is said:

"It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or fraud.

"Indeed, it may be generally assumed that in mercantile transactions principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond the scope of the agent's authority in the *narrowest sense* of which the expression admits."

"But," say the counsel, "so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as authority.

"A wider construction has been put on the words:

"Principals have been held liable for frauds when it has not been found that they authorized the particular fraud complained of, or gave generally authority to commit fraud. At the same time it is not easy to define with precision the extent to which this *liability has been carried*.

"The best definition of it, in their Lordships' judgment, is to be found in the case of *Barnick v. English Joint Stock Bank*. With respect to the question whether a principal is answerable for the act of his ^{agent} ~~against~~ the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule that the master is answerable for *every wrong* of the servant or agent as is committed *in the course of the services* and for the master's benefit, *though no express command* or privity of the master is proved. The principle is acted upon every day in running-down cases (that is, cases arising from damages to persons by street vehicles). It has been applied also to direct trespass to goods."

After enumerating other instances of its application the court proceeds :

“In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the *agent in his place* to do that class of acts, and he must be answering ^{also} for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in.”

This case seems to fully cover our case. While it is doubtless true that appellee did not authorize the Board of Directors to execute the bonds, no petition from the stockholders having been presented to them, and it is also probably true that appellee had no knowledge that such an act had been so done, unless the knowledge of the directors was the knowledge of appellee, yet appellee knew that the directors of that corporation were expressly authorized by the legislature and empowered to execute said bonds, and in executing them it was within the scope of its duty as agent ; and, possessing said knowledge, appellee, and not our clients, chose the directors, and thereby, as its agents, placed them in the position where they could violate their duty and wrongfully issue the bonds.

Appellee creating the opportunity of said directors to wrongfully execute the power possessed, appellee should be bound by that act.

Burroughs, p. 247, citing many authorities, speaks thus on this subject :

“The weight of authority as to completed, negotiable instruments of private parties, which, by fraud or inadvertence, have passed into the hands of holders for value without notice of the manner in which they were put into circulation, is that the makers are bound, although they do not intend that the note should be put into circulation. The want of delivery is not a defect apparent on the face of the paper. The maker has given to it all the appearance of *validity*, and if one of two innocent parties is to suffer, he who has put it *into the power* of a third party to produce this condition of things ought to suffer, and not the innocent holder.”

See *Krogan v. Wohlferd*, 17 Minn. 239; *Clark v. Johnson*, 54 Ia. 296; *Bussen v. Huntington*, 21 Mich. 415.

Here the principal has put it in the power of a third party to place in the hands of a *bona fide* holder his own note, which he did not intend should go into circulation, and for that act of want of care he must suffer the consequences rather than the innocent holder.

In the case at bar our clients are, as to most of the bonds, *bona fide* holders, without notice, of any defect of guarantees indorsed on the bonds, and appellee put it in the power of the directors, by making them directors, to execute said guarantees, and hence, as principal, appellee is responsible for its agent's said acts.

In the case at bar it was contended, by counsel for appellee, that because the directors wrongfully executed the power, as to appellee, in making the guaranty, therefore, in so doing, they were not the agents of appellee. This is not the law.

In the case of *McDonald v. Lane*, 18 Ga. 444, it was held that "where the *charter* of a bank required that 25 per cent in specie of the capital stock subscribed should be paid before the Board of Directors should proceed to issue notes," and this was never done, but the board issued the notes, they were held binding on the bank in favor of an innocent holder.

See *Mayor Norwich v. Norfolk R. R. Co.*, 4 El. and Bl. 397.

Here the power of the bank to issue notes depended on the compliance, first of the condition that 25 per cent of the capital stock should be paid. The required amount of specie had not been paid, still the Board of Directors issued notes and they were held binding on the bank in favor of an innocent holder.

This seems much like the case at bar.

Says Justice Story in his work on Agency, Secs. 452-562 and 563:

"It is a general doctrine of law, that although the principal is not ordinarily (for he sometimes is) liable in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in these acts or misdeeds;

yet he is held liable to third persons in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligence, and other malfeasances. or misfeasances and omissions of duty of his agent, in the course of his employment, although the principal did not authorize or justify or participate in or indeed know of such misconduct or even if he forbade the acts or disapproved of them.

"In all such cases the rule applies *respondeat superior*, and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal or indirectly with him through the instrumentality of agents.

"In every such case he holds out his agents as competent and fit to be trusted, and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of the agency."

In this case the Board of Directors were made, in substance, the corporation, but really as agents of the corporation by the act of the legislature, and the making of said guarantees was as much in the line of their duties and scope of their employment as any other act they were authorized to perform as directors, hence, for such act, appellee is responsible.

In support of the doctrine above laid down by Mr. Justice Story, he cites numerous authorities.

The same doctrine is laid down in the case of *Fitsherbert v. Mather*, 1 L. R. 11, and *Lock v. Stearn and others*, 1 Mass. 563:

"The rule is laid down generally in a recent compilation of good authority (3 Chitty Law of Com. and Manufactures, 209, 210), that though a principal in general is not liable criminally for the acts of his agent, yet he is civilly liable for the neglect, fraud, deceit, and other wrongful acts of his agent in the *course of his employment*, though in fact the principal did not authorize the practice of such acts."

In 2 Herman on Estoppel, p. 1333, it is stated:

"The company is bound by all the acts of its agents within the scope of his *apparent authority* unless notice is given the assured that, with reference to matters within the scope of his *apparent authority*, certain limitations are im-

posed upon the agent. The question is not what the *powers* of the agent in fact are, but what were his *apparent powers*. That is, what had the assured a right to believe were given to the agent (Do. 1332), and such company is estopped by the statement of a party, whom it holds out to the public as its agent, within the scope of their authority, however much he may have exceeded it in practice."

In the case at bar *power* existed in the directors to make the guaranty—they made it—they *appeared*, by the manner and form of making the guaranty, to be acting with full authority, and, being agent of appellee, appellee is responsible.

In the case at bar we find from the evidence, uncontradicted, that agents of the Contract Company, men of unimpeachable veracity and honesty, and in good faith, publicly sold the Beattyville bonds to raise money thereby to build and equip the Beattyville Railroad. That our clients bought these bonds without any knowledge other than that which they had learned from the Beattyville and the Louisville New Albany & Chicago Railroads, and from the guaranty endorsed on them in the name and under the seal of appellee, signed by its president, and attested just as should have been done if said guaranty had been properly endorsed as to appellee. Judging from the appearance of said guarantees, and all the known circumstances of the making of said bonds, had not our clients the right to believe that said directors had at least apparent authority to make said guaranty?

In *Gelpcke v. Dubuque*, 1 Wall. 175, it is said:

"It is a general doctrine that when a corporation has authority, by itself or by its agent, to issue *negotiable securities* the *bona fide* holder thereof has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

The same doctrine in nearly the same words is announced in the case of *Hackett v. Ottawa*, 9 Otto, 608.

The reason for the existence of such doctrine is, and it is in

harmony with other doctrines of the law, that when a corporation has *power* to issue negotiable securities, by such issue it makes itself liable for the payment of such securities, and the *bona fide* holder of them, knowing of the *power* to issue, is protected against any defense founded on any equities existing between prior parties, or of the want of compliance with any precedent condition, especially when the fulfilment of such condition is to be done by the corporation or some of its officers, and can be performed by no one else.

We call the attention of the court to the case of *The New York & New Haven R. R. Co. v Schuyler*, 34 N. Y. 31. This was an action in the nature of a suit in equity against Robert Schuyler and several hundred other defendants.

The object of the complaint was to have a large number of alleged false and fraudulent certificates and transfers of pretended stock of the company, made by Schuyler as agent, and charged to be held by the defendants, adjudged spurious and void (p. 31), and compel the certificates to be brought into court and cancelled, and to enjoin the several defendants from further prosecuting actions then pending, and from bringing suit against the company to enforce such certificates and transfers, or to give damages for any reasons connected therewith.

The court will perceive that in principle this case and the one at bar are almost precisely alike, and that the same law will properly apply to both.

The court held that the unauthorized acts of Schuyler, as the agent of the company, were binding on the company in favor of the *bona fide* holders of the alleged fraudulent certificates.

During the discussion of the various questions arising in the case the court laid down, among others, the following legal proposition :

“It is impossible to escape the conclusion that the law of this State, as settled by adjudication at this day is, as put by H. R. Seldon, J., in *Griswold v. Haven*, as follows: ‘That when the authority of an agent depends upon some fact

outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representations of the agent," although false as to the existence of such fact. "Seldon therein also stated that the mode in which the liability is enforced in all these cases is by estoppel *in pais*; the agent or partner has, in each case, made a representation as to a fact essential to his power upon the faith of which the other party has acted, and the principal or firm is precluded from controverting the facts as represented."

Where is the substantial difference between the facts of that case and those of the case at bar? In each case the agent exceeded his authority, but, being an agent, his principal in that case was held responsible for his unauthorized act.

In the case at bar the appellee alone had power to execute the guaranty, and it, and not our clients, knew whether the precedent condition had been complied with; and hence, our clients may rely on the *presumption* that it has been complied with.

The *execution and delivery of the guaranty* by the Board of Directors, they at the same time knowing, and our clients not knowing, and not having the means of ascertaining, whether the petition of the stockholders had been presented to said Board of Directors, before the guaranty was made, and our clients, being *bona fide* holders, without notice, of the invalidity of the guarantees, was a representation that the condition had been complied with, and, as against our clients, could not now be contradicted.

In the opinion just cited, the court further said:

"We may come back, therefore, to the solid ground of *The North River Bank v. Aymen*, regarding it only as shaken down to greater firmness by the severe ordeal of the *Farmers & Mechanics Bank* case, and, with confidence, declare the true doctrine of this branch of the law of evidence to be that when the *principal has clothed his agent with the power to do act, upon the existence of some extraneous fact necessarily and peculiarly within the knowledge of the agent, and the existence of which the act executing the power is itself a representation*, a third person dealing with such agent in

entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying the truth to his prejudice."

In *The North River Bank v. Aymen*, 3 Hill, 262, the above doctrine is stated in these words:

"Whenever the very act of the agent is authorized by the terms of the power, that is, whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent, such persons are not bound to inquire into facts *aliunde*, the *apparent authority* being the real authority."

From the case of *Story v. American Life Ins. Co.*, 11 Paige, Ch. R. 635, we copy from Chancellor Walworth's opinion the following extracts:

"The negotiable security of a corporation which, upon its face, appeared to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose, and at a place not authorized by the charter of the company, and in violation of the laws of the State where it was actually issued"—and further the Chancellor says: "The general principle, we think, fairly deducible from the authorities, is this, the general agent of a corporation clothed with a certain power by the charter, or the lawful act of the corporation, may use that power for an unauthorized, or even prohibited purpose, in his dealings with an innocent third party and yet render the corporation liable for his acts."

Relying on the previously cited authorities to sustain the claims of our clients, we conclude this portion of our brief by a summary statement of the result of said authorities and the facts to which they have been applied:

1. The Board of Directors, and they alone, are expressly *empowered* by the Legislature of Indiana to execute the guarantees in controversy.

2. The guarantees, as indorsed on the bonds, and the bonds on which they were indorsed, are each negotiable instruments.

3. Being negotiable, our clients, as *bona fide* holders of said bonds and guaranty, are entitled to the protection afforded to *bona fide* holders of negotiable bills of exchange or other negotiable paper, which protection extends to every defense not based on *want of power* alone in said directors to issue said guaranty.

4. The directors, in the execution of said guaranty, were the agents of appellee; and, having the power—intrusted by the legislature—and being by them elected as directors and placed in a position where they could abuse their trust, and being the chosen representatives of appellee, held out as worthy of all confidence in their employment, for their wrongful act appellee, as their principal, should be responsible.

Respectfully submitted,

SWAGAR SHERLEY,

Of Counsel.

ST. JOHN BOYLE,
BARNETT, MILLER & BARNETT,
SWAGAR SHERLEY,
Counsel.

POINTS AND AUTHORITIES.

I.

Appellee is a Kentucky Corporation.

Act of April 1, 1880, General Assembly of Kentucky.

Railroad v. Harris, 12 Wall. 65.

Railroad v. Vance, 96 U. S. 450.

Clark v. Barnard, 108 U. S. 436.

Graham v. Hartford R. R., 118 U. S. 161.

Pennsylvania Company v. St. Louis Company, 118 U. S. 296.

Martin v. B. & O. Railway Company, 151 U. S. 677.

Markwood v. Southern Railway Company, 65 Fed. Rep. 823.

The Western & Atlantic R. R. Co. v. Roberson, 61 Fed. Rep. 593.

Railway Company v. James, 161 U. S. 545.

II.

The consolidation of the Indiana "New Albany" with an Illinois Corporation in 1881, even if valid, did not destroy the Kentucky Corporation.

American Loan & Trust Co. v. Railway Co., 157 Ill. 641.

Articles 3 and 9 of the Contract of Consolidation.

Act of April 7, 1882 (Ky. Acts 1881-82, Vol. 2, 251).

III.

The Kentucky Acts were accepted by the Consolidated New Albany Company.

(a). Its deed of trust of date March 24, 1884.

(b). Its deed of trust of date January 1, 1886.

(c). Condemnation proceedings in the Jefferson County Court,
February 25, 1887.

- (d). Removal of suit of Woods v. L. N. A. & C. R. R. Co. from State Court of Indiana to Federal Court on its allegation that it was a Kentucky Corporation.
- (e). Lease with the Louisville Southern Railroad of date December 7, 1888.

As to all these acts, see stipulation, Tr. 65-67.

IV.

The directors of the "Monon," under the power granted by the Kentucky Act of 1882, had the right to make the guaranty.

Thompson on Corporations, Sections 3970, 3985.

2 Cook on Stockholders, Sections 708, 709, 712, 808.

1 Morawetz on Private Corporations, Section 513.

1 Wood Railway Law, Section 151.

Hoyt v. Thompson's Executor, 19 N. Y. 216.

L. E. & St. L. R'y v. McVey, 98 Ind. 393.

Thompson v. Natchez W. & S. Co., 68 Miss. 423.

Hodden v. K. & G. R. R. Co., 7 Fed. Rep. 796.

Wood v. Welen, 93 Ill. 1531.

Hendee v. Pinkerton, 96 Mass. 387.

Beveridge v. N. Y. E. R. R. Co., 112 N. Y. 1.

Flagg v. Manhattan Railroad, 10 Fed. Rep. 431.

Nashua R. R. Co. v. Boston R. R. Co., 27 Fed. Rep. 825.

Same case on appeal, 136 U. S. 384.

McCulloch v. Moss, 5 Denio, 575.

Moses v. Tompkins, 84 Alabama, 613.

Dana v. Bank of United States, 5 W. & S. 223.

Hudson v. Green, 91 Missouri, 367.

Gashwiler v. Willis, 33 Cal. 11.

Conro v. Fort Henry Iron Co., 12 Barbour, 27.

Clark v. Barnard, 108 U. S. 436.

V.

Power existed in the Board of Directors of the "Monon" under Section 3951a, b, c, of the Revised Statutes of Indiana, to make the guaranty.

Zabriskie v. The Cleveland, etc., Railroad Co., 23 How. 381.

Royal British Bank v. Turquand, 6 Ellis & Blackburn, 327.

Commissioners of Knox Co. v. Aspinwall, 21 How. 539.

County of Pendleton v. Amy, 13 Wall. 297.

VI.

The Beattyville bonds are commercial paper.

Burroughs on Public Securities, page 229.

Daviess County v. Huidekoper, 8 Otto, 98.

Moran v. Miami County, 2 Black, 722.

VII.

The guaranty endorsed on the Beattyville bonds is negotiable.

Form of the guaranty, made payable to holder.

Killian v. Ashby *et al*, 24 Ark. 511.

Cooper & Peabody v. Diedrick, 26 Wend. 430.

Bartridge v. Davis, 20 Vt. 497.

Webster v. Cobb, 17 Ill. 166.

Jackson v. Foote, 12 Fed. Rep. 37.

Studebaker v. Cady, 54 Ind. 586.

Davis v. Wells, Fargo & Co., 104 U. S. 690.

Toppan v. C. C. & C. R. R. Co., 1 Flippin, 74.

VIII.

The power in the Board of Directors to make the guarantee was so exercised as to bind appellee in favor of *bona fide* holders.

Battles & Webster v. Lindenschlager, 84 Penn. St.

Storey v. Am. Life Ins. Co., 11 Paige Ch. R. 635.

- Farmers National Bank v. Sutton Mfg. Co., 52 Fed. Rep. 191.
 Farmers & Mechanics Bank v. Butchers & Drovers Bank,
 16 N. Y. 125.
 Bissell v. Railroad Co., 22 N. Y. 289.
 Mech. Bank Asso. v. N. Y. & S. White Lead Co., 35 N. Y. 505.
 Wright v. Line Co., 101 Pa. St. 204.
 Water Co. v. DeKay, 36 N. J. Eq. 548.
 Credit Co. v. Howe Machine Co., 54 Conn. 357.
 Gelpcke v. City of Dubuque, 1 Wall. 203.
 Genessee Co. Sav. Bank v. Mich. Barge Co., 52 Mich. 438.
 Bird v. Daggett, 97 Mass. 494.
 Bank v. Young, 7 Atl. Rep. 488.

IX.

- The guaranty is valid as the act of Appellee's Agent.
 Humbolt Township v. Long, 2 Otto, 642; 72 Ill. 604.
 Eastern Railway Counties v. Hawks, 4 H. L. Cases, 831.
 Burroughs on Public Securities, page 247.
 Green Brice's Ultra Vires, page 344.
 Krogan v. Wohlfert, 17 Minn. 239.
 Clark v. Johnson, 54 Ia. 296.
 Bussen v. Huntington, 21 Mich. 415.
 McDonald v. Lane, 18 Ga. 444.
 Mayor Norwich v. Norfolk R. R. Co., 4 Ellis & Black. 397.
 Story on Agency, §§ 452, 562.
 Fitcherbert v. Mather, 1 L. R. 11.
 Lock v. Stearn, 1 Mass. 563.
 2 Hermann on Estoppel, p. 1333.
 Gelpcke v. Dubuque, 1 Wal. 175.
 Hackett v. Ottawa, 9 Otto, 608.
 N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 31.
 North River Bank v. Aymen, 3 Hill, 262.

FILED.

CHAS. A. BISHOP

ATTORNEY AT LAW

NEW YORK

UNITED STATES

IN SENATE
JANUARY 1, 1908

REPORT
OF THE

COMMISSIONER OF THE LAND OFFICE

TO THE SENATE

Supreme Court of the United States.

THE LOUISVILLE TRUST COMPANY, - *Appellant*,

VERSUS

THE LOUISVILLE, NEW ALBANY &
CHICAGO RAILWAY COMPANY, ETC., *Appellees*.

Brief in
behalf of
The
Louisville
Trust
Company.

This suit in equity was originally brought by the Louisville, New Albany & Chicago Railway Company—called the New Albany Company—against the Ohio Valley Improvement and Contract Company *et al.*, to cancel a guaranty which the New Albany Company had endorsed upon certain bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, otherwise called the Beattyville Company. A decree was entered in the Circuit Court directing a cancellation of the guaranty, and from this decree an appeal was prosecuted to the Circuit Court of Appeals for the Sixth Circuit.

The Circuit Court of Appeals reversed the decree of the Circuit Court, and a writ of *certiorari* was awarded by the Supreme Court, and pursuant to which the Record has been certified to this Court.

The New Albany Railway Company was originally an Indiana corporation, and operated a railroad between Chicago and the city of New Albany, Indiana, and had been formed and incorporated under the general laws of the State of Indiana. Desiring to extend its line of railway into the State of Kentucky and to acquire terminal properties in the city of Louisville, it procured the passage of an act by the Legislature of Kentucky, on April 8, 1880, entitled "An act to Incorporate the Louisville, New Albany & Chicago Railway Company." This act is as follows:

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That the Louisville, New Albany & Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations, and authority to operate a railroad.

2. That the Louisville, New Albany & Chicago Railway Company is hereby authorized to purchase or lease for depot purposes, in the city of Louisville or county of Jefferson, such real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machine shops, and for all switches or turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used, or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same, and for all such purposes shall have the right to condemn all property required for the carrying out of the objects herein named, and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights, and franchises.

3. That said corporation shall have the power and right to condemn all property in the city of Louisville or county of Jefferson, in this State, which may be deemed by it to be necessary for the purposes set out in this act; and that the proceedings for that purpose shall be instituted either in the Jefferson Court of Common Pleas or the Louisville Chancery Court, and shall be carried on, as nearly as may be, as actions at law by ordinary proceedings. Warning orders against non-residents, absent defendants, or unknown owners of property must be published three times in one of the daily newspapers published in said city of Louisville, State of Kentucky, the last publication at least ten days before the trial. The owners of distinct parcels of one contiguous tract may all be included in one proceeding, or any one or more of them holding contiguous tracts may be proceeded against in a separate action. The courts shall make all such rules, orders, and judgments as will secure a fair trial by an impartial jury of said city or county, and shall give proceedings upon its docket as soon as the parties are before the court and the issue made up. The jurors shall be sworn truly to ascertain and determine by their verdict the amount of compensation each owner will be entitled to if his land or property described in the petition be condemned. The court in which these pro-

ceedings are brought shall have power to assign a day for the trial of the case as soon as the petition is filed. Upon the return of the verdict, the court shall render judgment vesting title to the property described in the proceedings in said corporation, said judgment to take effect upon the payment into court by said corporation of the amount of money named in the verdict, within thirty days after the rendition of said judgment; and should said corporation fail to pay said money within said time, the said proceedings shall be dismissed without prejudice to other and subsequent proceedings.

4. This act shall take effect from and after its passage.

Approved April 8, 1880.

This act was afterwards amended, April 7, 1882, by an act entitled "An act to amend an act, entitled 'An act to incorporate the Louisville, New Albany & Chicago Railway Company,' approved April 8, 1880:"

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That the Louisville, New Albany & Chicago Railway Company is hereby authorized and empowered to endorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the State of Kentucky, and may consolidate its rights, franchises, and privileges with any railway company authorized to construct a railroad from the city of Louisville to any point on the Virginia line, such indorsement, guarantee, or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the State of Kentucky: Provided, It shall not lease or consolidate with any two lines of railway parallel to each other; or it may make such traffic arrangement of agreement with any such aforementioned road as its Board of Directors may deem proper.

2. This act shall take effect from and after its passage.

Approved April 7, 1882.

In 1889 this Railroad Company, which is known as "The New Albany Company," leased the railroad of the Louisville Southern Railroad Company, which railroad extended from Louisville to Lexington, in Kentucky, connecting with the Cincinnati Southern Railroad.

At that time there was being constructed a railroad from Versailles, on the Louisville Southern, to Beattyville, in Kentucky, at which point there were valuable coal fields. This Company had procured large subscriptions from the counties along its projected route, and had made a contract with the Ohio Valley Improvement and Contract Company, by which the Contract Company had agreed to construct and equip the line of railroad. In consideration thereof the Railroad Company was to execute and issue to the Contract Company its first mortgage bonds at \$25,000 per mile, to transfer to the Contract Company the subscriptions it had received from the communities, and also to issue to the Contract Company all of its capital stock except that which would have to be issued on account of such subscriptions.

Under these circumstances the New Albany Company, desiring to obtain access to the coal fields of Eastern Kentucky, made an agreement with the Contract Company, which was then engaged in the work of construction, by which it undertook to guarantee the payment of the Beattyville Company's bonds *in consideration of receiving three fourths of the entire capital stock of the Beattyville Company.* (Rec. p. 20.)

The work of construction proceeded, and as the bonds were delivered to the Contract Company *pari passu* with the work done, the New Albany Company endorsed its guaranty upon such bonds and received the proportion of the capital stock to which it was entitled under its contract, until they had endorsed the bonds to the amount of \$1,185,000 and received \$888,750 of the capital stock of the Beattyville Company.

Shortly afterwards the management of the New Albany Company was changed at a meeting of the stockholders; and shortly thereafter the new management repudiated the agreement to guarantee the bonds, and on April 9, 1890, brought its bill of complaint in this cause for the purpose of canceling the contract with the Contract Company, and its endorsement which had already been placed upon the bonds.

The bill of complaint charges that the contract with the Contract Company was fraudulent, and was made for the purpose of benefiting some of the directors of the company who became purchasers of some of the guaranteed bonds.

A restraining order issued upon this bill, and the defendants having filed a plea to the jurisdiction on the 28th day of May, 1890, the plea was overruled and a temporary injunction granted. (Rec. p. 26.)

Under these circumstances the Contract Company, being compelled to dispose of its bonds to continue its work, in order to be relieved of the injunction, surrendered all the bonds in its possession which had been guaranteed and had the endorsement canceled upon them; and such endorsement has been canceled upon all but \$650,000 of the guaranteed bonds. Most of these are involved in this controversy and are in the hands of *bona fide* purchasers for value, and without notice.

At the time of the decision of the court on the plea to the jurisdiction and the granting of the temporary injunction, none of these *bona fide* holders were before the court, and no final decree was then entered. Afterwards a supplemental bill was filed setting up what had occurred on the original bill and bringing in these purchasers, or some of them. Answers were filed denying any allegations of fraud and alleging the purchase of the bonds in good faith and without notice of any defect.

As a matter of fact the fraud is disproved, but at any rate would have no effect upon the controversy with these purchasers. The real controversy with these purchasers arose out of the grounds asserted in the bill, as follows:

1. That the Company was solely a corporation of the State of Indiana, and that the laws of that State did not authorize the execution of the guaranty; that the law of Indiana provided that such a guaranty could not be made except upon the petition of the holders of a majority of the capital stock of the Company; that there had been no such petition, and that therefore the guaranty by the Board of Directors was *ultra vires* and void, even as to *bona fide* holders for value, and without notice.

2. That there was not a quorum of the Board of Directors when the resolution was passed authorizing the guaranty. This contention is disposed of by the stipulation on page 165 of Record, wherein it is stated that the guaranty was authorized by the Board of Directors, but not by the stockholders. It, therefore, may be eliminated from consideration.

The Circuit Court of Appeals held:

1st. That the corporation, while an Indiana corporation, was also a Kentucky corporation; that, as a Kentucky corporation, it was expressly authorized to guarantee the bonds in controversy; that, as to such guaranty, it bound all the property of the Company within the State of Kentucky.

2d. The Court held that it was also an Indiana corporation, and that under the statutes of Indiana it had corporate power to guarantee the Beattyville bonds, under the section——, which authorized it upon the petition of stockholders; that this provision, requiring the petition of stockholders, related wholly to the inner management of the Company, and did not affect the *bona fide* purchasers for value.

3d. The Circuit Court of Appeals, however, neglected to consider a point, viz., that the statutes of Indiana authorized such a guaranty under two conditions:

(a) The guaranty might be made as a means of consolidating two companies, or of one company acquiring the controlling stock of another.

(b) They could guarantee the bonds of a company without any consideration of value, but for accommodation, when the company came within certain restrictions and a petition of the stockholders requested it.

The Circuit Court of Appeals for the Sixth Circuit decided the case entirely upon the hypothesis that it was one of the latter kind, that is, a guaranty for accommodation merely, and held that, being empowered to make such a guaranty upon the petition of stockholders, if such guaranty was made—though without the petition—it was valid in the hands of *bona fide* holders for value.

The Court, however, entirely overlooked the contention that, independent of this statute of accommodation, there were other provisions in the Indiana statutes which authorized a transaction of this kind. In other words, there is a clear distinction in these statutes between one which is made for value received, and one which is for accommodation. That is, the statutes of Indiana provide that one company may, in order to acquire another or the controlling interest in another, purchase the stock of such other or consolidate with it, and may for such purpose guarantee the bonds of the other company.

The careful and painstaking statement of facts made by the Circuit Court of Appeals, and the elaborate discussion of the question in the opinion of that Court (Record page——, and reported in 75 Fed. R. 433), render unnecessary any detailed statement of the facts or lengthy argument in behalf of the Louisville Trust Company. It is conceived, however, to be essential to call attention to some particular points, and especially to one contention which was not passed upon by the Circuit Court of Appeals.

I.

THE NEW ALBANY COMPANY, ALTHOUGH A CORPORATION OF THE STATE OF INDIANA, WAS ALSO A CORPORATION OF THE STATE OF KENTUCKY.

If so, it was especially authorized by the law of the latter State to guarantee the payment of bonds issued by any other railway company in Kentucky. The words of the act approved April 8, 1880, are, that such New Albany Company was authorized and empowered

“to endorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the State of Kentucky.”

The Act of April 8, 1880, expressly provided in the title that it was "an act to incorporate the Louisville, New Albany & Chicago Railway Company," and provided that such corporation, "organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, to contract and be contracted with, and to have and use a common seal, with the power incident to corporations, and authority to operate a railroad." It was given authority to build connecting lines, and for the purpose was given the benefit of the power of condemnation.

It can no longer be denied that the corporation of one State may be at the same time a corporation of another, and this, indeed, happens whenever the corporations of two States become consolidated into one company.

Railroad Co. v. Harris, 12 Wall. 65;
 R. R. Co. v. Vance, 96 U. S. 450;
 Clark v. Bernard, 108 U. S. 436;
 Graham v. R. R. Co., 118 U. S. 161;
 R. R. Co. v. Robinson, 65 F. R. 592.

In R. R. Co. v. Harris, the Supreme Court said :

"Nor do we see any reason why one State may not make a corporation of another State, as they are organized and conducted, a corporation of its own *quo ad hoc* its property within its territorial jurisdiction."

In Railroad Company v. Vance, the Court said :

"But it may be suggested that the utmost which can be claimed for the act is, that without creating a new corporation in Illinois it only made the complainant, as an Indiana corporation, a corporation of the State of Illinois. It was clearly competent for the General Assembly to have done this."

In Memphis R. R. Company v. Alabama, 106 U. S. 585, the Court said :

"The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which can not sue or be sued by another citizen of Alabama in the United States Courts."

In *Martin v. Baltimore & Ohio R. R.*, 151 U. S. 673, the opinion by Mr. Justice Gray reviews the subject, and it was decided that the Baltimore & Ohio R. R. Company was a Maryland corporation, and might also have been a corporation of Virginia, but the statute of that State did not suffice to constitute it a corporation of such State.

II.

THE KENTUCKY CORPORATION EXISTS, OR CONTINUES TO EXIST, NOTWITHSTANDING THE CONSOLIDATION OF THE INDIANA CORPORATION WITH AN ILLINOIS CORPORATION.

It was contended that after the passage of the acts incorporating the Company in Kentucky, the Indiana corporation entered into a consolidation with the Chicago & Indianapolis Railway Company, and in which consolidation the Kentucky corporation did not join, and that the effect of this was to destroy the separate existence of the Indiana corporation, and consequently that of the Kentucky corporation. What became of the title to the property that the Kentucky corporation had acquired by condemnation nowhere appears. No precise argument is made upon the subject, but the contention is that the Kentucky corporation was lost in the shuffle.

It is reported that Justices Jackson and Brewer were of this opinion, but there is no record of the fact.

The contention, however, would seem to be ineffectual at the present time. The pretended consolidation took place in 1881,

and the effect of an attempt at such consolidation came before the Supreme Court of Illinois in a case where a corporation of that State undertook to consolidate with a corporation of an adjoining State. It was, after mature consideration, in an elaborate opinion held by that tribunal that there was no law of the State of Illinois prior to 1883 which authorized any such consolidation, that the attempt was nugatory and absolutely void, and that, as to property in Illinois, the mortgage executed by the Consolidated Company, and the bonds issued thereunder, were invalid and of no effect. It was held that such corporation was not even one *de facto*, because there could be none such *de jure*. (*American Loan & Trust Co. v. Minnesota Co.*, 157 Ill. 741; 47 N. E. Rep. 153.)

As the consolidation with the Illinois corporation was void, the Indiana corporation must have retained its existence, and therefore remains as it was before—a corporation also of the State of Kentucky.

III.

BUT, IF A CORPORATION OF THE STATE OF INDIANA ALONE, GUARANTY OF THE BONDS WAS AUTHORIZED BY THE STATUTES OF THAT STATE AS A MEANS OF ACQUIRING THE KENTUCKY RAILWAY.

The statutes of Indiana which authorized this are as follows :

3951. PURCHASE AND CONSOLIDATION OF BRANCH ROADS. Any railroad company incorporated under the provisions of this act shall have the power and authority to acquire, by purchase or contract, the road, roadbed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect the line of such railroad company, or any part of the same, or the use and enjoyment thereof, in whole or in part; may also purchase or contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining States; and may assume such of the debts and liabilities of such corporations as may be deemed proper. Upon

purchasing any such railroad or railroads all the real and personal property of such corporation so purchased, and also the rights, powers, and franchises of the same, shall become vested in the railroad company so purchasing the same, together with all the rights, powers, privileges, and franchises conferred by the charters of the roads so purchased and all amendments thereto and the provisions of this act: and the company so purchasing and acquiring the title to or use of such railroad or railroads shall have power to complete, maintain, and operate the same. Any railroad company incorporated under the provisions of this act shall also have power to consolidate with other railroad corporations in the continuous line, either within or without this State, upon such terms as may be agreed upon by the corporations owning the same; and also shall have the power and authority to construct, equip, maintain, and operate branch railroads leading from the main line or from the termini of such railroad, from and to such points within this State or any adjoining State as may be deemed expedient; and in constructing the same shall have the right to enter in and upon all lands; to survey routes; to receive donations of lands or moneys; to purchase and condemn lands required for the use of the road; to lay single or double tracks, and to cross all water-courses and public highways, not unnecessarily obstructing the same. In condemning lands for the use of such roads it shall have all of the rights and powers conferred upon such corporations by their charters and amendments and the general laws of this State. All railroads purchased and branch roads constructed, as aforesaid, shall be vested in and become a part of the property of the corporation so purchasing or constructing the same, as aforesaid; and shall be in all things governed by the laws, rules, and regulations governing the corporation purchasing or constructing the same, as aforesaid, and be operated as part of its line of road. Upon purchasing or constructing any railroad, as hereinbefore provided, the corporation purchasing or constructing the same shall have power and authority to issue new stock to such extent as may be considered advisable, and the same to dispose of as hereinbefore provided; to issue and sell bonds to such extent as may be deemed expedient, and to secure the same by mortgages and deeds of trust upon all the real and personal property, rights, powers, and franchises of any railroad so purchased, constructed, or in course of construction, as hereinbefore provided: *Provided*, That the provisions of this act shall not be so construed as to authorize any railroad company organizing under the same to consolidate with or acquire, by contract or purchase, the road, roadbed, real and personal property, rights, and franchise of

any railroad already built, equipped and operated within the State of Indiana, and which may cross or intersect the line of the road of any company organizing under this act; but the powers of consolidation and purchase shall be and are hereby limited and restricted to such roads within the State of Indiana as may cross and intersect the same, and which have not been equipped and operated in whole or in part.

Provision is also made for the consolidation of Indiana companies with railroads in adjoining States, and for extensions by an Indiana company into or through any other State, as follows (in force February 23, 1853):

3971. POWER TO CONSOLIDATE GENERALLY. Any railroad company heretofore organized under the general or special laws of this State shall have the power to intersect, join, and unite its railroad with any other railroad constructed or in progress of construction in this State or in any adjoining State, at such point on the State line or at any other points as may be mutually agreed upon by said companies; and said railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining State with whose road or roads connections are thus formed: *Provided*, their charters authorize said railroads to go to the State line or to such point of intersection.

3972. EXTENSION THROUGH OTHER STATES. Any railroad company heretofore organized or which may hereafter be organized under the general or special laws of this State, for the purpose of constructing a railroad from any point within this State to the boundary line thereof, is hereby empowered to extend said railroad into or through any other State or States, under such regulations as may be prescribed by the laws of such State or States into or through which said road may be so extended; and the rights and privileges of said company over said extension in the construction and use of said railroad for the benefit of such company, and in controlling and applying the assets of such company, shall be the same as if its railroad had been constructed wholly within this State.

The Court will observe the great liberality in the foregoing statutes, authorizing them both to purchase and to consolidate with connecting roads within adjoining States, and for such pur-

pose to assume such of the debts and liabilities of other railway corporations as might be deemed proper.

The right to purchase or contract for the use and enjoyment, in whole or in part, of any railroad lying within an adjoining State, and the right to consolidate with any such corporation, implies the right to use all means to accomplish the purpose which are usual or necessary.

Tod v. K. U. Land Co., 57 Fed. R. 47;
Dewey v. Toledo, 51 N. W. Rep. 1063;
Atchison v. Fletcher, 35 Kan. 236.

Section 3951 has been so interpreted by the Supreme Court of Indiana. There, the Local Trade Railway Company had purchased a large amount of the capital stock of the Cincinnati, Rockport & Eastern Railway Company, and certain of its stockholders filed a bill to set aside the purchase on the ground that one corporation was not authorized to acquire the stock of another. But the Supreme Court held that, as the Railway Company was authorized to purchase the property itself, or to consolidate its stock with that of the other company, it was also authorized, as a means to attain the end, to become the purchaser of the stock of such other Company; and sustained the validity of the transaction.

Hill v. Nisbet, 100 Ind. 341.

In this case, for the purpose of acquiring the use and control of the Beattyville Railroad, the New Albany Company undertook to acquire three fourths of its capital stock, and in consideration thereof agreed to guarantee the payment of the bonds issued by the Beattyville Company. The transaction is fully authorized by the above statutes. The Circuit Court of Appeals overlooked this contention, and based its decision upon a different statute. But it is, with due deference, submitted that the statutes above quoted authorize the transaction complained of.

It was said, many years ago, by the Supreme Court, in a case of a similar guaranty:

“It is proved that it is a common practice for railroad corporations to make similar arrangements to enlarge their connections and increase their business.”

Zabriskie v. Cleveland R. R., 23 Howard 381.

To the same effect is *Ellsworth v. St. L. R. R.*, 98 N. Y. 533.

It is submitted that, under these statutes and the construction put upon them in *Hill v. Nisbet*, the guaranty was fully authorized, and is a binding obligation of the obligor company.

IV.

THE GUARANTY WAS FURTHER AUTHORIZED BY STATUTE OF INDIANA, AND MIGHT BE MADE EVEN FOR ACCOMMODATION.

This statute is as follows:

3951a. The Board of Directors of any railway company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the State in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining State, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

3951b. PETITION OF STOCKHOLDERS. 2. The petition of the stockholders specified in the preceding section of this act shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

3951c. LIMITATION OF THE POWER. 3. No railway company shall, under the provision of this act, indorse or guarantee the bonds of any such railway company or companies, as is above mentioned, to an amount exceeding one half of the par value of the stock of the railway company so indorsing or guaranteeing as authorized under this act.

It will be observed that this statute does not require that there be any consideration for the guaranty. It provides:

1st. That the Board of Directors of the Railway Company may direct the guaranty of the principal and interest of the bonds.

2d. It must be upon the bonds of a company, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway company guaranteeing the bonds.

3d. It must be upon the petition of the holders of a majority of the stock of such company.

4th. The petition of the stockholders must state the facts relied on to show the benefits accruing to the guaranteeing company.

5th. The amount of bonds guaranteed shall not exceed one half the par value of the stock of the guaranteeing company.

The distinction between the guaranty authorized by this statute and that authorized by the other statutes quoted above is very marked, and was evidently intended to apply to cases other than those covered by the previous statutes; in fact, it was intended to extend the power even to cases where no consideration was to pass between the parties.

It is stipulated in this case that the Board of Directors duly authorized the indorsement of the guaranty, which is as follows:

"For value received, the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond the payment by the obligor therein of the principal and interest thereof, in accordance with the tenor thereof.

"In witness whereof, the said Railway Company has caused its corporate name to be signed hereto by its President, and its seal to be attached by its Secretary."

And it was so signed, and the seal was so attached and attested.

It is also stipulated that no petition by the stockholders was presented to the Board of Directors, requesting the guaranty.

The bonds with the indorsement of guaranty were put upon the market and sold, and those now in controversy are held by

bona fide holders for value, and without notice that such petition was not presented. The power of the corporation to make the guaranty is not disputed. The want of the petition of the stockholders does not affect the corporate power.

It will be observed that no meeting of the stockholders was required, nor was there to be any official or technical act on their part. The petition was one which was to be signed by individual stockholders, without any meeting or any action on their part as a body. There was, therefore, no necessity or reason for the records of the Company to set forth such a petition. It was the Board of Directors who were to act when such petition had been presented, and they, therefore, were to determine whether or not it had been presented, and whether or not the signers were stockholders, and whether or not they constituted a majority thereof, and whether it did or did not set forth the benefits which were to accrue. What proceedings might be taken by the directors might or might not appear upon their minutes, but such minutes are not public records, and convey no notice to the outside world. It is not within the power, nor is it within the duty, of a purchaser of negotiable bonds to have knowledge of what appears on the records of a private corporation.

Mr. Justice Brewer said, in the case of *Blair v. The St. Louis R. R. Co.*, 25 Fed. R. 684:

“I do not understand that a man dealing with a private corporation, or even a quasi-public corporation like a railroad, is bound to take notice of what the records of that corporation show, for if it be so, no man can deal with a corporation in safety without first having access to and an examination of its books, and the converse of that would be true, that such a corporation is bound to show its records to whosoever has dealings with it.”

Nor is the Board of Directors an agent of the corporation in the ordinary meaning of the term, nor are their powers governed by the law of agency. They are constituted by law the governing body of the Company, and are entrusted with the conduct of

its affairs. It has the power to make all lawful contracts; it may issue bonds, execute mortgages, and do all acts which arise in the ordinary management of the corporate affairs and which the corporation is authorized to perform.

Beveridge v. N. Y. R. R., 112 N. Y. 1;
 Louisville R. R. v. McVay, 98 Ind. 391;
 Flagg v. Manhattan, 10 Fed. R. 413;
 1st Waterman on Corp., Sec. 124.

V.

WHERE THERE IS POWER IN A CORPORATION TO ACT, THERE IS NO QUESTION OF ULTRA VIRES. IF THE POWER HAS BEEN IRREGULARLY EXERCISED BY CORPORATE OFFICERS, THE QUESTION IS ONE OF THE GENERAL LAW GOVERNING NEGOTIABLE INSTRUMENTS. IN SUCH CASE THE BONA FIDE HOLDER FOR VALUE WITHOUT NOTICE MAY ENFORCE A NEGOTIABLE OBLIGATION.

If commercial instruments are to be subject to such defenses as are contended for in this case, the use and value of such instruments would be almost destroyed. It will be noted that if the purchaser of a bond must take notice whether or not a petition had been filed, he must also take notice that it has been signed by persons who are stockholders in the company, and that they hold sufficient stock to constitute a majority. A petition not so signed would have no more effect than if there were no petition. As a practical question, how could a purchaser obtain such information, and must he take a negotiable instrument at the peril of his having been misinformed? In the vast number of cases where railroad mortgages have been executed, and where the law requires that it should be done by a vote of the majority of the stockholders, is it true that the purchaser of the bond in open market can be defeated by evidence that the stockholders voting for the measure did not constitute a

majority? It would seem that such a principle would take away the whole foundation of the faith and credit which is given to such securities. The general doctrine established by the decisions is inconsistent with such a position :

“Where a party deals with a corporation in good faith (the transaction is not *ultra vires*) and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

“If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.”

Merchants Bank v. The State Bank, 10 Wall. 644.

Again, in another case :

“A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that *it could not make it*. The contract can not be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

“When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing law, neither the corporation nor the other party to the contract can be estopped by assenting to it or by acting upon it to show that it was prohibited by those laws.” (Central Transp. Co. v. Pullman, 139 U. S. 59.)

More important still is the decision in the case of the St. Louis Railroad v. The Terre Haute Railroad, 145 U. S. 393. In that case the Illinois statute declared as follows :

“ It shall not be lawful for any railroad company of Illinois to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company out of the State of Illinois, *without having first obtained the written consent of all of the stockholders of said roads residing in the State of Illinois*, and any contract for such consolidation or lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void.”

The Supreme Court decided that this provision was enacted solely for the protection of the stockholders, and that it was not a limitation upon the scope of the corporate powers, and consequently it could be ratified or made good by estoppel. On this subject the Court said :

“ Although this statute in terms declares that any such lease, made without the written consent of the Illinois stockholders, ‘shall be null and void,’ it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny.” Citing:

Zabriskie v. Cleveland, &c., R. R., 23 How. 381, 398 ;
Central Transportation Co. v. Pullman’s Car Co., 139 U. S.
24, 42, 60 ;
Davis v. Old Colony R. R., 131 Mass. 258-260 ;
Beecher v. Marquette & Pacific Co., 45 Mich. 103 ;
Thomas v. Citizens’ Railway, 104 Illinois, 462.

This case is based upon the fundamental distinction which was maintained by the Circuit Court of Appeals between those acts which are *ultra vires* because prohibited by reason of public policy

and which can not be made valid by acquiescence or estoppel, and those other acts which are within the general powers of the corporation but which are limited or regulated solely for the benefit of the stockholders themselves. In the latter case the stockholders may ratify what has been done. If the contract be executed upon the other side, the company is estopped to plead want of power. In all such cases where to sustain the plea of want of power would produce injustice, it will not be allowed.

The distinction is very clearly stated in the case of *Ditch Co. v. Zellerbach*, 37 Cal. 543, in which Justice Sawyer says:

"The term *ultra vires*, whether with strict propriety or not, is also used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. An act is also sometimes said to be *ultra vires* with reference to the right of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose; and the rights of strangers dealing with corporations may vary according as the act is *ultra vires* in one or the other of these senses. All these distinctions must be constantly borne in mind in considering the question arising out of dealings with a corporation. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea; but when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case."

The same distinction is drawn in the following cases:

Hervey v. Railway Co., 28 Fed. R. 169;
Cambell v. Argenta Mining Co., 51 Eed. R. 1;
Wood v. Corry Water Works Co., 44 Fed. R. 146;
Wright v. Pipe Line Co., 101 Pa. St. 204;
Union Pacific Railroad Co. v. Chicago Railway, 51 Fed. Rep. 309.

The same principle is established in the law of England. The discussion of the English authorities in the opinion of Judge Taft is so thorough and complete as to render unnecessary any review of them here.

Bank v. Turquand, 6 El. & Bl. 327;
Mahony v. Mining Company, L. R. 7 H. L. 869.

The attention of the Court is called to the distinction between powers of municipal corporations and of business corporations. The principles which underlie the right to enforce the obligation in the one class of cases is entirely unlike that in the other. There is a presumption, in the case of a municipal corporation, that it has no power to issue negotiable instruments (*Brenham v. German Am'r Bank*, 144 U. S. 173). But, on the other hand, the corporation engaged in business is presumed to have the power to issue negotiable paper. While a municipal corporation can only act through public officers, whose doings are matters of public record, it may well be maintained that there is the duty—as well as the right—to investigate and ascertain the basis of the acts of the municipal officers. But, in the case of private corporations, there is neither the right nor the duty to examine into its private records. The authorities, therefore, which refer to municipal securities are based on very different doctrines from those which govern in the case of business corporations, and are therefore not of value in reaching a conclusion in the latter case.

ST. JOHN BOYLE,

Counsel for Louisville Trust Company.

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W. C. Callahan

Nov 9, 1896

Court of the United States

COMMENCED AT 10 AM

THE LOUISVILLE TRUST COMPANY

Assistant

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LOUISVILLE NEW ALBANY & CHICAGO RAILWAY
COMPANY

THE LOUISVILLE BANKING COMPANY

Assistant

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LOUISVILLE NEW ALBANY & CHICAGO RAILWAY
COMPANY

**WRIT IN SUPPORT OF PETITION FOR
WRITS OF HABEAS CORPUS.**

G. W. WRETZINGER

E. G. FIELD

JAMES S. PIRTELL

For Petitioner

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

THE LOUISVILLE TRUST COMPANY,

Appellant,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,

THE LOUISVILLE BANKING COMPANY,

Appellant,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,

**BRIEF IN SUPPORT OF PETITION FOR
WRITS OF CERTIORARI.**

G. W. KRETZINGER,
E. C. FIELD,
JAMES S. PIRTLE,

For Petitioner.



POINTS AND AUTHORITIES

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

This suit involves the validity of an alleged guarantee, endorsed on 1185 Beattyville bonds of \$1,000 each and interest from July 1, 1889.

The Circuit Court of Appeals act clearly vests in this court express judicial authority to grant a writ of *certiorari* in any case.

In *Law Ow Brew v. United States*, 144 U. S., p. 58, this court defined the class of cases in which the writ of *certiorari* should issue, in the following words:

“And as *certiorari* will only be issued when questions of gravity or importance are involved, or in the interest of uniformity of decision, the object of the act is thereby attained.”

Here the record presents not only “*questions of gravity and importance*,” but also conclusively shows that its review by this court is necessary to maintain “*uniformity of decision*.”

Some of the questions are and involve:

1st. Did the Kentucky act of 1880, *without* natural persons for incorporators and *without* provisions for stock, stockholders, directors or officers, create a Kentucky corporation which could become a corporate citizen of the State of Indiana, vested with Kentucky corporate powers for exercise.

The Circuit Court of Appeals answered this question

in the affirmative, which we submit is in conflict with *Railway Co. v. James*, 161 U. S., 545.

2d. Under this Kentucky act could petitioner as a corporation created by the consolidation of Indiana and Illinois companies, exercise powers inconsistent with or not granted by the laws of both Indiana and Illinois?

3d. Did the Indiana act of 1883 authorize an interstate company of Indiana and Illinois to guarantee railroad bonds of an adjoining state so as to bind the entire property, franchises, income and earnings of such consolidated company in both states, or was it a domestic statute limited to Indiana domestic companies?

4th. Under the Indiana act would the directors of an Indiana company have any authority, whatever, to direct a guaranty of the bonds of a Kentucky company *without* a petition from the stockholders in the manner and to the effect required in such statute.

5th. Does the mere election of directors to exercise general powers constitute any *apparent* authority *whatever* to exercise any special statutory power expressly vested in the stockholders?

6th. Upon this record were the stockholders estopped from promptly upon first notice repudiating such guaranty attempted without their act or knowledge or were they estopped by the *mere* election of directors as general agents to exercise general powers?

7th. Was *not* the guaranty here endorsed sufficient notice that it was for the debt of the maker of the bond and put the purchaser upon inquiry.

8th. May the public presume from the *mere* act of an agent that he has the requisite *special* authority to exercise a *special* statutory corporate power, especially

when the same is vested in a body, expressly named for exercise ?

No more important questions were involved in *Bank of Augusta v. Earle*, 13 pet., 519, than here presented. In fact the most important question in *that* case recurs in *this*, and in *that* case Mr. CHIEF JUSTICE TANEY said : " It will be seen that the questions brought here for decision *are of a very GRAVE character*, and they have received from the court an attentive examination ", to which add a matter of transcendent " gravity and importance," *namely* the necessity of preserving the supremacy of the decisions of this court, and keeping in strict line and harmony with them the decisions of the nine Circuit Courts of Appeal.

We respectfully submit that the matters and questions arising upon the petition here presented, and their decision by the Circuit Court of Appeals *as shown*, are essentially sufficient under this Circuit Court of Appeal act, and as the same has been construed and restricted by this court, to entitle petitioner to the writ prayed.

But in further support of this petition and motion we submit the following points and authorities.

II.

THE KENTUCKY ACT OF 1880 DID NOT CREATE A CORPORATION. IT WAS NO MORE THAN AN ENABLING ACT OR LICENSE.

The holding of the Circuit Court of Appeals that this act created a corporation cannot be sustained upon principle or authority. All cases cited in the opinion upon that point are relieved of the interpretation and force given them by that court or are directly overruled by *Railway Company v. James*, 161 U. S., 545, which it cites in support of its holding.

That the Circuit Court of Appeals misread and misapplied *Railway Company v. James*, *supra*, and that its holding is in conflict with the decisions of this court *we submit*:

First. In this act the Kentucky legislature expressly dealt with the New Albany Company as "*a corporation organized and existing under the laws of the state of Indiana.*" (See section 1, Kentucky act of 1880, Ex. "A.") It was not dealing with the personal stockholders or incorporators of the Indiana company, but with the Indiana corporation itself. It made no provisions for stock, stockholders, directors or officers. The express and implied powers it vested were limited to the acquirement of terminal facilities in the county of Jefferson and city of Louisville. (See Section 2, Kentucky act, 1880, Ex. "A.")

This court held in *Railway Company v. James*, *supra*, "It should be observed that in the present case the corporation defendant was not incorporated as such by the state of Arkansas. The legislation of that state was profess- edly dealing with a railroad corporation of other states".

In *Railway Company v. Harris*, 12 Wall. 81, this court held that the Virginia act "*was a license and nothing more*", and so held because that act left the Maryland corporation "*in its name, locality, capital stock, the election and power of its directors, in the mode of declaring dividends and doing all its business, its unity was unchanged.*"

The Court of Appeals held, that, although the Kentucky company was not named in and was not a party to the articles of consolidation, it passed into such consolidation through the consolidation of Indiana and Illinois companies. *We submit*, if it was a Kentucky corporate entity, it could *not* so pass into this consolidation without so contracting as a constituent; *that if it did* pass into the consolidation *without* being a party to the agreement to consolidate *it was because* the Kentucky act was a mere license and followed its Indiana licensee.

But an essential factor in the creation and existence of a corporation is succession. Here no succession can occur. Upon the dissolution of the Indiana incorporator the Kentucky company must terminate. Again, such succession requisite and essential to corporate existence can only occur through stock, and successive stockholders, none of which are provided for in the Kentucky act.

Second. The Circuit Court of Appeals held that this court decided (*Ry. Co. v. James*) that the "Missouri company might be a corporation of Arkansas by virtue of the statute making it such," etc. It is clear that that court either overlooked or misinterpreted the following clear and unambiguous language of this court.

"It is therefore obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas company did *NOT convert it* into an Arkansas

corporation;" that "it would be *necessary* to create it out of *natural* persons whose citizenship of the state creating it could be imputed to the corporation itself."

James v. Railway, supra, 564.

The Circuit Court of Appeals further held that, inasmuch as the *sole* incorporator of the alleged Kentucky company was an Indiana corporation, *no* presumption of its Kentucky citizenship could arise. Therefore, this *Kentucky* corporation was a corporate citizen of *Indiana*. (Opinion C. C. A. Rec., p. 168.) If this novel position is maintained, it conclusively follows that, instead of the Kentucky legislature creating a Kentucky corporation, it created an Indiana corporation, and vested it with Kentucky charter powers for exercise. *Such a conclusion is in direct conflict* with every decision of this court involving the citizenship of corporations, the power of one state to create a corporation in another, and that all corporations are incontrovertibly controlled, limited and restricted by the laws of the states creating them, and that they can only be deemed or taken as citizens of the states of their creation.

This principle, so tersely stated in *Bank v. Earle, supra*, has been repeated and approved in all subsequent decisions of this court involving this question, and was reaffirmed with judicial emphasis in *Railway Company v. James, supra*. Thus if, as there held, the Indiana corporation had "no legal existence" in Kentucky because it could not migrate—could not leave the state of its creation—it was never present in the State of Kentucky as a corporate entity for Kentucky incorporation, and in this attempted reincorporation it was not represented by any agent. It appears in the Kentucky act by its corporate name *alone*, notwithstanding by its

mere corporate name it is "a mere artificial being, invisible and intangible," and as such can *only* act by and through agents that are visible and tangible.

But upon the rule stated and the principle announced by this court in *Railway Co. v. James, supra*, the Kentucky legislature was powerless to create a corporation of Indiana, or to create one that can only be deemed or taken as a corporate citizen of Indiana and endow it with Kentucky corporate powers for exercise.

"And neither state could confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised." (*Ry. Co. v. James, supra.*) * * *

"It may, indeed, be composed of and represent, under the corporate name, the same natural persons."

Such an incorporation by the Kentucky legislature of natural persons by the same name—the name of the Louisville, New Albany and Chicago Railway Company—is *not before the court*.

III.

WITHOUT THE AUTHORITY AND CONSENT OF INDIANA THE NEW ALBANY COULD NOT ENTER INTO A CHARTER CONTRACT WITH THE STATE OF KENTUCKY, AND COULD EXERCISE NO POWERS IN KENTUCKY WHICH IT COULD NOT EXERCISE AT HOME.

A charter is a contract between the state and the incorporators. If the Kentucky act incorporated the Indiana corporation, using it as its Kentucky incorporator, it conclusively follows that the Kentucky charter is a contract between the State of Kentucky and this Indiana corporation.

In *Railway Company v. James, supra*, the court said:

"It is competent for a railroad corporation organized under the laws of one state, *when authorized so to do by the consent of the state which created it*, to accept authority from another state to extend its railroad into such state and *to receive a grant of power* to own and control by lease or purchase railroads therein and to subject itself to such rules and regulations as may be prescribed by the second state."

We deny that such Indiana statutory authority exists and respectfully submit that the court of appeals *mis-interpreted* the Indiana statute as well as the opinion of this court (*James v. Ry. supra*). The court of appeals cite and quote in its opinion the following clause from section 3,951 of the Revised Statutes of Indiana:

"May also purchase or contract for use and enjoyment, in whole or in part, of any railroad or railroads, lying within adjoining states; and may assume such of the debts and liabilities of such corporations as may be deemed proper," saying:

"The statutes of Indiana applicable to the company

also provided that 'every such railroad corporation should have capacity to hold, enjoy and exercise, *within* other states, the aforesaid faculties, powers, rights, franchises and immunities, and such others as may be conferred upon it by any law of *this* state in any other state in which any portion of its railroad may be situate or in which it may transact any part of its business.' Revised Statutes of Indiana 3,949."

But observe that the contract in question was not made with the Beattyville Company—did not contemplate the acquirement of the Beattyville road by purchase, lease or consolidation. It was simply a contract with the Construction Company to purchase from it part of the Beattyville stock, and to guarantee the Beattyville bonds after such stock and bonds became the property of the Construction Company, through which neither petitioner or its Indiana constituent could have acquired any title to the Beattyville road or any part thereof as contemplated or authorized in the provisions of the Indiana statute here under consideration. In fact the Circuit Court of Appeals touching this question held:

"We are of opinion that the necessary effect of the act of 1883 was to require that thereafter where a guaranty was deemed a proper means in the exercise of power conferred by section 3951, it could only be used with the consent of a majority of the stockholders. Of this view was the Circuit Court, and we concur therein."

It conclusively follows, therefore:

1. That these Indiana statutes did *not* authorize petitioner to purchase the stock from the Contract Company and guarantee Beattyville bonds owned by it.
2. That the Indiana statute of 1883 did *not* authorize the purchase of the *stock* of a Kentucky company.
3. That *no* authority whatever can be found in any of these Indiana statutes which purports in any sense to authorize an Indiana legal entity to enter into a charter

contract with the State of Kentucky by the reincorporation of its corporate entity in that state, and as shown, no such corporation could be created or could exist without natural persons for incorporators.

Ry. v. Harris and *James v. Ry. Co.*,
supra.

4. No authority can be found in any of these Indiana statutes which authorized or purport to authorize any Indiana Company to exercise any Kentucky statutory corporate power *not* required in the operation of a road, or part of a road, in Kentucky which such Indiana Company might acquire by purchase, lease or consolidation.

Section 3945 to 3951 inclusive (quoted under Ex. "C"), provide for the incorporation of two distinct classes of railroad corporations with appropriate powers for exercise in the acquirement of title to foreclose railroads and the maintenance and operation thereof.

1st. For the incorporation of companies under Indiana laws to purchase at a foreclosure sale railroads *wholly* within the State of Indiana, the same being covered by the foreclosed mortgage.

2d. To purchase at foreclosure sale railroads partly within and partly *without* the State of Indiana, the whole being covered by the foreclosed mortgage.

Petitioner's Indiana constituent belonged to the first class and therefore was not controlled by the statute cited and quoted by the Circuit Court of Appeals.

Section 3945 makes this distinction clear. It provides:

" In case of the sale of any railroad and its property, under or by the authority of any competent court or courts (part of which railroad may be situate within the State of Indiana, and part situate an adjoining State, and embraced in the mortgage or mortgages or deed or deeds of

trust), it may be sold at one time and place, as an entirety," etc.

Section 3947 provides :

" Such corporation shall possess all the powers, rights, privileges, immunities and franchises in respect to said railroad, or the part thereof purchased as aforesaid, and of all the real and personal property appertaining to the same which were possessed or enjoyed by the corporation that owned or held the said railroad, previous to such sale, by virtue of its charter and amendments thereto and other laws of this state or any other state in which any part of said railroad is situated, *not inconsistent with the laws of this state.*"

It would seem incredible that the Indiana legislature intended by section 3947 as so clearly expressed therein, to prohibit a corporation upon its organization to purchase at a foreclosure sale, from taking or exercising powers of the foreign mortgagor "*inconsistent*" with its home power, and then intended by implication to authorize it to exercise inconsistent foreign powers under section 3951, *especially* when clearly repugnant to the restrictions expressed therein. Such a holding would violate every well known rule for the construction and interpretation of statutes.

It is manifest from section 3951 that the additional power therein conferred to purchase a railroad which " in whole or in part " is in an " adjoining state," and to " assume such of the debts and liabilities of said corporation as may be deemed proper," does not furnish authority in words or by implication to purchase stock, or to guarantee the debt of a railroad *which it does not purchase.*

An assumption of a debt by the purchaser upon property purchased is a part of the purchase price and becomes the debt of the purchaser.

Again, the same section provides:

" All railroads purchased and branch roads constructed as aforesaid shall be vested in and become a part of the property of the corporation so purchasing or constructing the same as aforesaid, and shall be, in all things, governed by the laws, rules and regulations governing the corporation purchasing or constructing the same as aforesaid, and be operated as part of its line of road."

Thus a company wholly within Indiana that purchases a road, in part or in whole, in an adjoining state remains subject to the laws of Indiana, and operates such road in such adjoining state as a part of its Indiana line.

NO ONE OF THESE SECTIONS EXPRESS OR IMPLY AUTHORITY TO ASSUME THE DEBT OF A ROAD *not* LEASED OR PURCHASED.

IV.

Observe that the Indiana act of 1883 not only creates a special power, but expressly limits its exercise by the stockholders to special classes in Indiana and in adjoining states:

First. To Indiana companies whose lines extend across the state. *All others* were excluded from this limited and restricted special power and guaranty.

Second. Bonds in an adjoining state for guaranty were limited to the roads in such state that would in their construction and operation benefit such Indiana roads extending across the state. *All* bonds of *all* other roads in adjoining states were expressly excluded from this statute for guaranty, and thus the guarantee thereof was prohibited.

Until this question was determined, *namely*, until the stockholders by petition certified their decision to the directors that the Beattyville road would aid the traffic and business of the New Albany road, the Beattyville bonds were excluded or could not be deemed and taken as within this Indiana act for guaranty, and could not be brought within the provisions—the restricted and conditional authority thereof, by a *mere* presumption arising upon the manual act of an executive officer. The investigation of a railroad and thereon to decide whether its operation would be beneficial to the New Albany Company, and thus determine if its bonds would fall within the provisions of this statute for guaranty, involve the exercise of *quasi* judicial power. The legislature having expressly vested in the body of the stockholders this power, judicial in its nature, to decide as to what bonds

are guaranteeable under the statute, their decision is conclusive and ought not to be reviewed by the court.

Ry. Co. v. Supervisors, 48 N. Y., 97.

Ballinger v. Gray, 51 N. Y., 610.

Mayor v. Davenport, 92 N. Y., 604.

Until the Beattyville bonds were brought within this statute by such action by the stockholders, the directors had *no* more statutory authority to direct their guaranty than if such statute had *never been passed*.

Defendant's equities as alleged *bona fide* purchasers, depending *alone* upon blind presumptions *voluntarily* indulged, could not determine or cut off the statutory power vested in the stockholders to determine against the world the question as to whether the Beattyville road was within the statute for the guaranty of its bonds.

This record contains the express judgment of the stockholders by their repudiation of this contract and guaranty at their first opportunity that the Beattyville road in its operation would not benefit or aid the business or traffic of their company, and therefore the Beattyville bonds were not within the Indiana statute for guaranty. Every case cited in the opinion of the Circuit Court of Appeals in support of this guaranty or in finding a remedy thereon for the alleged *bona fide* purchasers have been repeatedly distinguished by this court from the one at bar, upon three grounds:

First, they arose under general powers conferred upon the corporation without restriction and without limitation as to class or subject.

Second, express power was expressly vested in the directors for exercise.

Third, in the exercise of such general powers the directors were authorized either expressly or by implication to issue negotiable paper to aid in the conduct of the

business of the corporate maker, or they contained recitals of due performance of the law sufficient to create and feed an estoppel.

In *Dixon Co. v. Field*, 111 U. S., 83, held:

“ And the estoppel does not arise except upon matters of fact which the corporate officers had authority by law to determine and to certify.”

Here, there were neither recitals in the guaranty or “ authority by law ” in the directors or executive officers to determine the vital statutory question which was committed by the legislature to the exclusive judgment of the stockholders.

V.

PETITIONER, CREATED BY THE CONSOLIDATION OF ILLINOIS AND INDIANA COMPANIES, COULD NOT BY GENERAL CONTRACT BIND ITSELF IF SUCH CONTRACT WAS PROHIBITED OR NOT AUTHORIZED BY THE STATE OF EITHER OF ITS CONSTITUENTS.

The Circuit court of appeals held “ that the guaranty was, therefore, a valid obligation of the Kentucky corporation, enforceable against petitioner's property in Kentucky.”

(Op. Cir. Court of Appeals, rec. p. 175.)

Suppose petitioner is sued upon this guaranty in Kentucky, would the judgment be limited in its enforcement to property in Kentucky, or would it not simply be a general judgment which could be enforced against the property and earnings of the consolidated Indiana and Illinois corporation? This guaranty, if valid, creates a general commercial debt. It was not authorized by Illinois statute and was, therefore, prohibited in that

state, *because* by withholding a power from a corporation, its exercise is forbidden.

Suppose suit is brought in an Illinois court upon a judgment rendered in a Kentucky court upon this guaranty, would such judgment be open to the defense that the guaranty was void under Illinois law? If not, it conclusively follows that if the opinion of the court of appeals is sustained, one state could enforce its legislation upon corporate constituents of consolidated companies in another state, and make courts of such other state powerless to enforce their prohibitory statutes.

We are confident that a doctrine so inconsistent and dangerous will find no support in this court.

State v. Maine Central Ry. Co., 66 Maine, 488, involved this precise question. The court held (p. 497):

“The corporate rights of the new corporation are those derived from its charter—the act of consolidation—under and by virtue of which alone it began to be and is. * * * The corporations comprising it have no further power to control their assets or direct their own movements. The new corporation has its stock, its stockholders, its directors, precisely as if the individuals owning stock had organized to form a corporation. * * * Its corporate life dates from the day of its organization. * * * *The assets of both corporations have become commingled and united.* * * * The corporations out of which it is created cease to exist or exist only for special purposes. * * * (P. 511.) The new corporation would have only the privileges, powers and immunities which the corporation with the least powers, privileges and immunities possessed *and which were common to them all.*”

It is conclusive, therefore, that the Kentucky amendment, even if the New Albany became a Kentucky corporation and as such passed into the consolidation, and the Indiana act of 1883, remained as they were, local and domestic acts, and the powers therein vested could not be exercised by the consolidated company of Indiana and Illinois.

Upon the consolidation of two companies, a new one comes into existence and the constituents are dissolved or at least they cease to own or hold any corporate property or assets of any nature whatever and are incapable of binding the consolidated company or its property by contract.

Shields v. Ohio, 35 U. S., 319.

Railway Co. v. Georgia, 98 U. S., 359.

Clear Water v. Meredith, 1 Wall., 25.

How could the Kentucky Company bind petitioner, a corporation created by the consolidation of Indiana and Illinois Company, or, how could petitioner as such consolidated company bind the Kentucky Company, so as to reach through a judgment upon the guaranty here involved the property of petitioner—as an Indiana and Illinois corporation?

Yet the court of appeals held that your petitioner as such consolidated Indiana and Illinois company and the alleged Kentucky, New Albany were jointly liable on the guaranty here involved and thereupon by express order directed that petitioner as such consolidated company of Indiana and Illinois should be released from the guaranty on forty-five of the bonds and that such guaranty should only be held binding against the Kentucky New Albany, and thus by judicial action making another and different contract between the parties than that originally entered into, even if the same were valid.

In *Railway Co. v. Berry*, 113 U. S., 465, this court held that a consolidation upon like terms and conditions adopted for the creation of petitioner made a new corporation, with an existence dating from the date when the consolidation took effect, and therefore privileges conferred upon one of the constituents by statute did not pass to such new company.

If a statutory privilege granted to one of the constituents could not pass to the new company, then a special power granted to such constituent could not.

VII.

The general and implied corporate powers of petitioner as a consolidated corporation, were limited by the articles and laws of its creation to the ownership and operation of railroads *wholly* within the States of Indiana and Illinois.

That both general and implied powers are restricted in their exercise to the corporate purposes expressed in the articles or charter. See

Thomas v. Railway Co., 101 U. S., 82.

Oregon Ry. Co. v. Oregon Ry. Co., 130 U. S., 1.

Ins. Co. v. Rundell, 103 U. S., 336.

Pierce v. Railway Co., 21 How., 414.

Ernest v. Nichols, 6 House Lord cases, 418.

Balfour v. Ernest, 94 Eng. C. L., 600.

Ridley v. P., G. & B. Co., 2 Exch., 711.

Railway Co. v. Bowser, 48 Pa. St., 29.

People ex rel., etc., v. Chicago Trust Co., 130 Ill., 268.

Davis v. Old Colony Ry. Co., 131 Mass., 258, and numerous cases therein cited.

The enumeration of these corporate purposes in these articles excluded all implied power not necessary to effectuate them.

See cases *supra*.

VIII.

Petitioner had no general power to lend its credit or guarantee the debts of any other enterprise or company.

" *It is no part of the ordinary business of corporations and a fortiori*, still less so of non-commercial corporations to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are *ultra vires*, whether in the direct form of giving accommodation bills or otherwise becoming liable for the debts of others."

Lucas, Cashier, etc., v. White Line Transfer Co., 70 Iowa, 546.

See

Morawitz, Section 537.

Davis v. Old Colony Ry. Co., *supra*, and cases cited in opinion.

Coleman v. Ry. Co., 10 Beav., 1.

Ry. Co. v. Ry. Co., 11 C. B., 775.

Pearce v. Ry. Co., 21 How., 443.

IX.

All courts agree that it requires special legislative power to authorize the purchase of the stock or to guaranty the debt of any *other* company or enterprise, and when granted the same remains a special power and does not become one of the general powers of the company to acquire and operate the railroad mentioned in its charter or articles of incorporation.

In *Franklin County v. Bank*, 68 Me., 45, held :

"In the United States corporations *cannot* purchase or hold or deal in the stock of *other* corporations *unless* expressly authorized to do so by law. Green *Ultra Vires*, 95, and note citing a number of authorities. * * * If a corporation can purchase any portion of the capital stock of another corporation it can purchase the whole, and invest all of its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. * * * *This the law will not allow.*"

This precise question was involved in *People v. Chicago Gas and Trust Company*, 130 Ill., 268.

To the same effect see :

Sumner v. Marcy, 3 W. & M., 105.

Ry. Co. v. Pierce, 21 How., *supra*.

Bank v. Agency Co., 24 Conn. Rep., 159.

Starin v. Town of Genoa, 23 N. Y., 439.

X.

THIS CASE INVOLVES THE LAW OF AGENCY AS WELL AS
QUESTIONS OF CORPORATE POWER.

An agent exercising general powers within the limits of expressed corporate powers might be deemed and taken as the general agent of the company, and as such authorized to transact its *ordinary* business in the *usual* manner, but in the exercise of any *special* authority affecting any subject outside of these express corporate powers he must be deemed and taken as a *special* agent, and those dealing with him must take notice that his authority as such *special* agent is not *general* but limited, and *no presumption* will be substituted for actually absent special authority.

Starin v. Town of Genoa, 23 N. Y., 439.

Balfour v. Ernest et al., 94 Eng. C. L.,
600.

Pratt v. Short, 79 N. Y., 437.

Ry. Co. v. Iron Co., 44 Ohio St., 44.

Hackensack Water Co. v. DeKay, 46 N. J.
Eq., 548.

Martin v. Mfg. Co., 9 N. H., 71.

Morawetz, Secs., 602, 604.

LeMoyne v. Bank, 3 Dill., 44.

Spence v. Ry. Co., 79 Ala., 585.

Ernest v. Nichols, 6 House of Lords, 418.

Chambers v. Railway Co., 5 B. & S., 17.

THE PUBLIC IS REQUIRED TO TAKE NOTICE OF THIS DIFFERENCE BETWEEN GENERAL AND SPECIAL AGENTS AND THEIR AUTHORITY.

A collateral guaranty is *unusual*, and therefore presumably *unauthorized*. The purchaser therefore is bound to take notice that general corporate agents ordinarily have no power by virtue of their offices as such, to fasten such liability upon the corporation and no presumptions will protect such guaranty.

The general rule is stated in *March v. Fulton Co.*, 10 Wall., 676.

"The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper alleged to have been issued under a delegated authority, etc."

In *Bank v. Bergen*, 115 U. S., 391, held:

"The delegation must be first established before the doctrine can come in for consideration."

Thus the court applies the general rule applicable to commercial paper issued by an agent to determine not only the sufficiency of his authority to bind his principal, but as to whether such authority was in fact given. *Here* the stockholders gave no authority *whatever* to the directors without which they had no statutory authority to act, and no estoppel or presumptions could arise to relieve the purchaser from any inquiry or from acting at his peril.

The last utterance of this court on this subject is *Evansville v. Denett*, 161 U. S., p. 441.

Which re-affirms,

Buchana v. Litchfield, 102 U. S., 278 ;
School District v. Stone, 106 U. S., 183,
 187.

To the same effect, see, *Thomas v. Railway Co.*, 5 B. & S. 117, E. C. L. Rep., 586, decided in the Exchequer Chamber, eight years after *Bank v. Turquand*, upon which the Circuit court of appeals relied with such confidence.

XI.

The court of appeals held that the consideration for the guaranty here at issue was for the benefit that might come to the traffic and business of petitioner as guarantor and thus fell within its general corporate powers.

The contrary is expressly held in *Davis v. Old Colony Ry. Co.*, *supra*, and numerous cases therein cited and in *Pierce v. Ry. Co.*, *supra*, and in cases *supra*.

XII.

The court of appeals held that the grant of this exclusive power to the stockholders which was equivalent to an express prohibition against its exercise by the directors, was a mere internal regulation, therefore equivalent to a by-law or secret resolution.

In *Beveridge v. Ry. Co.*, 112 N. Y., p. 1, held :

“ By laws constitute regulations between the members, but a requirement in the legislative act containing the grant of general or special power *is a part of the grant* or contract between the state and the corporation * * *

“ As agents of the corporation we must find the extent of their (directors) powers by an examination of the laws

under which it was created and exists. Those laws in defining the power of the corporation define the scope of the directors' powers to act for it."

Ins. Co. v. Rudell, 103 U. S., 337.

To same effect see :

Elevated Ry. Co. v. Elevated Ry. Co., 11

Daly, 373; expressly approved in *Beveridge v. Ry. Co.*, *supra*.

Bank v. Dandridge, 12 Wheat., 78.

Twin Lick Oil Co. v. Marbury, 91 U. S., 587.

The Indiana act of 1883 expressly defines and limits the authority of the directors and makes it wholly dependent for existence and exercise upon the petition of the stockholders.

The word directors does not appear in the Kentucky act of 1880.

The Kentucky act of 1882 expressly and directly vests corporate power in the company by its corporate name and *not* in the directors to guarantee, to consolidate or to lease.

McShane v. Carter, 80 Cal., 312, involved a statute which made the authority of the directors to act dependent upon the action of the stockholders, the court held :

"We think the provision of said act GOES TO THE POWER OR AUTHORITY of the directors."

If the Kentucky act adopted as a part of its alleged incorporation of petitioner's Indiana constituent the board of its constituent to represent and exercise this Kentucky corporate authority, then such Indiana directors must be

controlled by Indiana and not by Kentucky law, which would require the petition of the stockholders before special power to guarantee could be exercised.

The public—the purchasers of Beattyville bonds—were bound to take notice of this legislative grant of special power and could indulge no presumptions as substitutes for authority in the directors as special agents to “direct” the execution of the guaranty.

In *Davis v. Railway Company*, 131 Mass., 258, held :

“ That the public is bound to take notice of the legal limitations of corporate capacity with the legal distinction between ordinary and extraordinary powers and of all limitations and restrictions upon the latter.”

Spence v. Railway Co., 79 Ala., 585.

Dudley v. Whittier, 46 Ala., 664.

In *Stillman v. Railway Company*, 27 Grat., 119, held :

“ If they had not such notice it was their own fault.

Pierce v. Ry. Co., *supra*.

XII.

If purchasers may, from the manual execution of a guaranty without recitals, presume that statutory conditions precedent to an authorized execution have been performed—that the stockholders had specially authorized the directors to “direct” such guaranty, then any limitation, restriction or qualification that the legislature might prescribe would be *wholly* unavailing.

(Op. Judge Barr Ex. F. to Pet.)

If this doctrine is sound, the result is so startling that a change in the law should occur without delay; but the contrary is the rule, and the necessity for its enforcement finds abundant support in the adjudicated cases, and nowhere more clearly stated than by Mr. Justice GRAY, in *Beveridge v. Ry. Co.*, 112 N. Y., 1.

“If it is deemed to be too extensive a power to be vested in the directors, and dangerous to the rights of the stockholders in possibility of fraud, it is for the legislature to interfere and prescribe regulations for its exercise.”

The legislature did deem it “*too extensive a power to be vested in the directors,*” and did regard its exercise by the directors as “*dangerous to the rights of the stockholders in the possibility of fraud,*” and therefore the legislature did “*interfere and prescribe regulations,*” etc.

What the legislature feared has occurred, through the holding of the Circuit Court of Appeals, “that this legislative grant of corporate power, and its exclusive vestment in the stockholders for exercise was a mere internal regulation,” which holding, if not reversed by this court, will become the law of this court, and under

All the stockholders have done was to become incorporated and elect directors under the laws of its incorporation, and to repudiate the attempted guaranty promptly upon first notice.

In *Ernest v. Nichols*, 6 H. L. cases, p. 418, Lord WENSLEYDALE said:

"If they do not choose to acquaint themselves with the powers of the directors it is their own fault," etc.

In *McShane v. Carter*, 80 Cal., 312, held:

"Nor can the consent of the stockholders be presumed from the mere fact of the conveyance, whether under the corporate seal or not, etc."

The Circuit Court of Appeals deals with the Indiana statute as if it constituted special instructions issued by petitioner to its general agents.

In *Ernest v. Nichols*, *supra*, Lord WEDNESDALE said:

"The great body of shareholders, for whose protection these limitations are provided, cannot be affected unless they are complied with."

Fountain v. Ry. Co., L. R. Eq. 5, 321.

Beveridge v. Ry. Co., *supra*.

Lord v. Y. F. G. Co., 99 N. Y., 547.

Adams v. Trego, 35 Mo., 66, involved the act of a corporate agent: Held: "If powers like the present were construed as contended for by the appellee, there would be no safety for principals."

XIV.

THE GUARANTY ITSELF WAS SUFFICIENT NOTICE TO THE PURCHASER OF BONDS UPON WHICH IT WAS ENDORSED.

A purchaser of a negotiable note in usual form, executed by a corporation may presume that it was given for a debt of the maker, but suppose petitioner had issued its negotiable paper instead of its guaranty, on the face of which appeared the words, "this note is made for the accommodation of the Beattyville Company and to meet one of its obligations," and defendants had purchased the same, would it be held that they were innocent purchasers for value without notice?

In equally plain words the guaranty declared that it was a collateral contract executed for the bonded debt of the Beattyville Company.

Bank v. Bank, 95 U. S., 557, involved a guaranty endorsed upon a note or draft.

Mr. Chief Justice WAITE said:

"The very form of the paper itself carried notice to the purchasers the possible want of power to make the endorsement, and is sufficient to put him on guard."

To the same effect see

Lemoine v. Bank, 3 Dill., 44.

Hendrie v. Berkowitz, 37 Cal., 113.

Therefore purchasers were bound to take notice "of the possible want of power," *namely*, whether the stockholders had made the petition required in Section 3,951 *a* and *b*, which constituted the only authority—the *only* power of attorney under which the directors were authorized to act, and *without* which their act would be *wholly* unauthorized and void.

The difficulty in this case has arisen from the confusion of general and specific powers and general and special agents, and upon the theory that general authority to exercise general powers constituted an apparent authority to exercise special powers touching transactions *outside* of the usual or ordinary corporate business.

X V .

The prompt repudiation of the contract and guaranty was followed by the immediate commencement of this suit and the tender of the stock, which is the alleged consideration for the guaranty. A void contract ought not to be enforced, and it is contrary to equity to retain it. Equity will therefore cancel it.

Second Story Eq. Sec. 694-700.

R. R. v. Shuyler, 17 N. W., 592.

Sherin v. Terry, 36 Fed., 337.

That a guaranty of the character and form here involved was always open to the defenses existing against the first taker, see

Trust Co. v. The Nat. Bk., 101 U., S. 70.

Petitioner has undoubted right both under the statutes and as repeatedly held by this court in its application of the general principles of commercial law to allege and show that the agents purporting to bind it, had in fact no authority to execute the guaranty because the statutory requirements did not exist. Therefore petitioner is entitled to the affirmance of the decree of the court below.

In conclusion, we respectfully urge that the review and decision by this court of the questions here presented are manifestly essential:

1st. To maintain harmony between the Circuit courts of appeal in their future decisions of like questions.

2d. To thereby furnish the federal courts a final and binding rule for their guidance and decision.

3d. To finally advise by the adjudication of this supreme judicial tribunal all investors in corporate stocks and bonds of their corporations, whether they may rely upon legislative restrictions and limitations upon directors and officers for their protection against unauthorized acts and spoliation of their corporate property.

4th. And with equal certainty to advise the public investing in guaranties that they cannot create special authority, or even appearance of authority by blind presumptions, which clearly entitle petitioner to the writ as prayed.

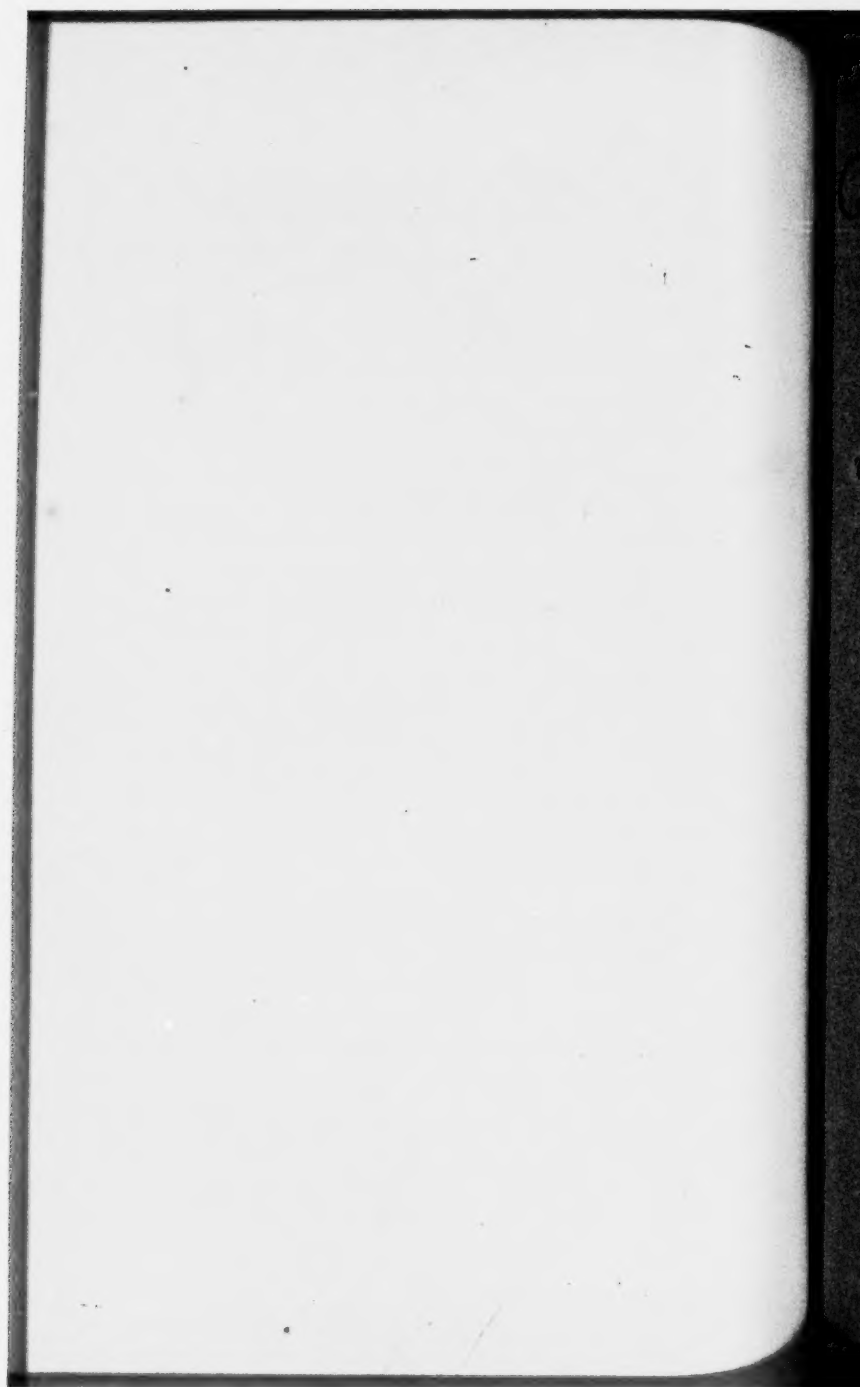
Respectfully submitted.

G. W. KRETZINGER,

E. C. FIELD,

JAMES S. PIRTLE,

For Petitioner.



5 645 4 646
29 30

Sup of Kretzinger & Field for
appellee
Supreme Court of the United States,

Filed Feb. 27, 1897.

THE LOUISVILLE TRUST COMPANY,

Appellant,

THE LOUISVILLE, NEW ALBANY
RAILWAY COMPANY

Office Supreme Court, U. S.
& CHICAGO
FEB 27 1897
JAMES H. McKENNEY,
COMPANY, CLEAR.

THE LOUISVILLE BANKING

Appellant,

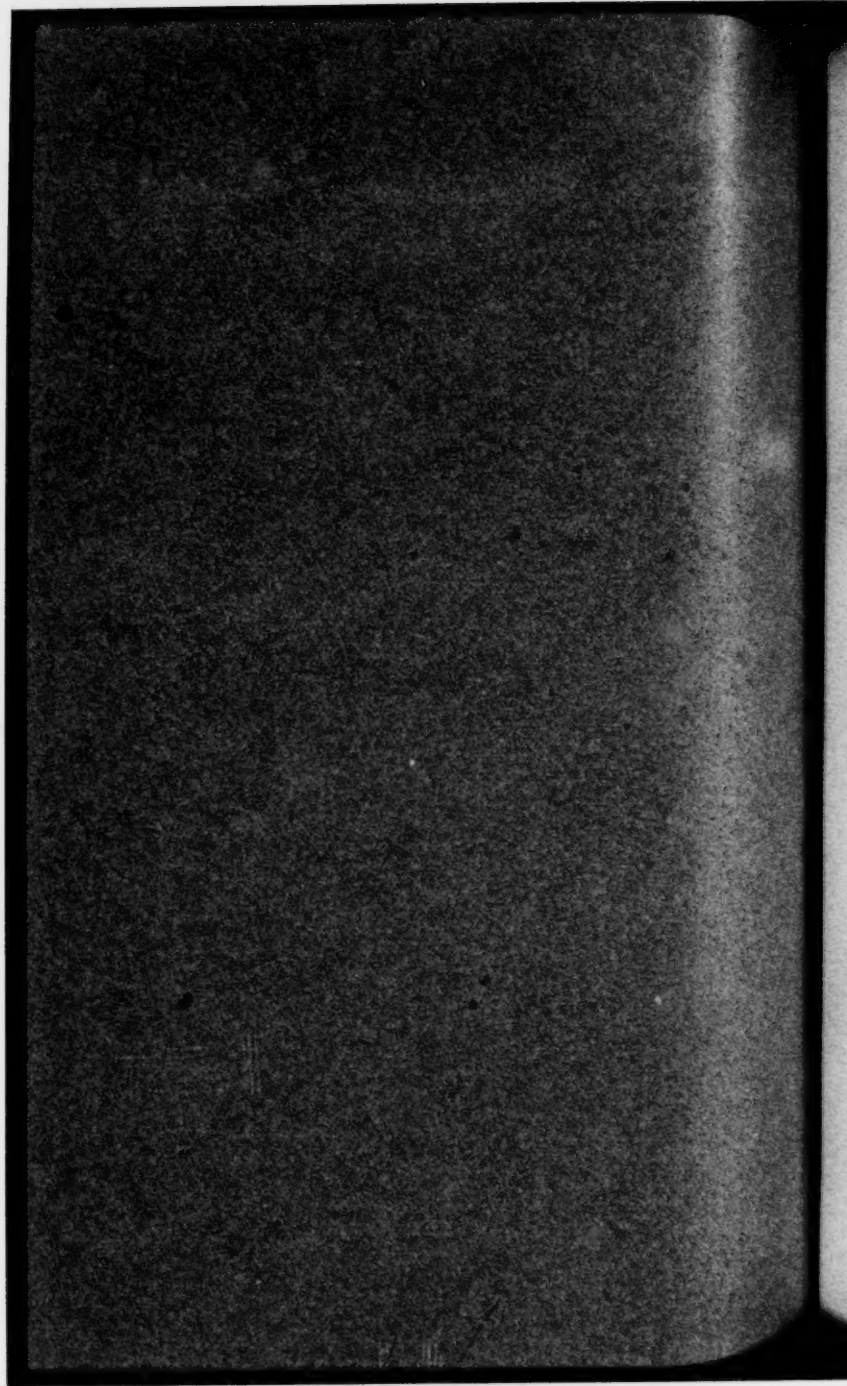
No. 645.

THE LOUISVILLE, NEW ALBANY & CHICAGO
RAILWAY COMPANY.

Motion by Appellee to direct Circuit Court to Vacate
Order, etc., Affidavit, Transcript of Record, and
Points and Authorities in support thereof.

GEO. W. KRETZINGER,
E. C. FIELD,
JAMES S. PIRTLE,

For Louisville, New Albany & Chicago
Railway Company, Appellee.



IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

THE LOUISVILLE TRUST COMPANY, *Appellant,*

vs.

No. 645.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY.

THE LOUISVILLE BANKING COMPANY, *Appellant,*

vs.

No. 646.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY.

MOTION.

Upon due notice, made and filed with the clerk, now comes the Louisville, New Albany & Chicago Railway Company, by its counsel, and moves this Honorable court to direct the Circuit Court of the United States for the District of Kentucky, sitting at Louisville, to vacate an order entered by it, on the 14th day of November, 1896, therein and thereby dismissing the bill of the Louisville, New Albany & Chicago Railway Company, as to certain defendants thereto and acting upon other matters as shown in the moving papers submitted herewith in support of this motion, said order having been entered by said Circuit Court pending the petition in this court for the issuance of writs of *certiorari* in the above entitled causes and before said writs issued.

G. W. KRETZINGER,

E. C. FIELD,

JAMES S. PIRTLE,

*Solicitors for Louisville, New Albany &
Chicago Railway Company, Appellee.*

THE ATTACHED, SUBMITTED IN SUPPORT OF THE FOREGOING MOTION CONSISTS IN:

- 1st. The affidavit of Geo. W. Kretzinger;
- 2d. The transcript of Circuit Court, showing motion on mandate and order entered thereon dismissing bill, and motion of appellee to vacate said order;
- 3d. Opinion of the Circuit Court on appellee's motion to vacate order;
- 4th. Points and authorities in support of the foregoing motion.

AFFIDAVIT IN SUPPORT OF MOTION.

George W. Kretzinger, on oath states that he is the general counsel of the appellee in the above entitled causes, and as such is fully authorized to make this affidavit.

For information to the court affiant submits herewith a transcript from the Circuit Court for the District of Kentucky which transcript contains:

1st. The order of said court entered November 14, 1896, dismissing appellee's bill of complaint as to part of the defendants thereto and executing the mandate of the Circuit Court of Appeals, as to the others.

2d. The mandate of the Circuit Court of Appeals upon which said order was made, said mandate having been issued out of the Circuit Court of Appeals of date June 22, 1896, and filed in said Circuit Court at Louisville for the District of Kentucky on November 14, 1896, the same being the date of the entry of said order therein dismissing, etc., as aforesaid.

3d. Motion by the above appellee, as plaintiff in the

Circuit Court, to set aside said order so made and entered November 14, 1896, as aforesaid.

4th. And in support of said motion in said Circuit Court as appears in said transcript the above appellee filed and presented to said court:

(a) The order of this court made and entered November 16, 1896, therein directing the issue of writs of *certiorari* in the above entitled causes.

(b) The affidavit of affiant therein stating and setting forth the steps taken in the application to this court for the issue of said writs of *certiorari* and the stipulation made by counsel for the above appellants with reference thereto.

And affiant here refers to said affidavit and asks that it may be examined and considered at this point and herewith to save repetition.

The dates of steps and proceedings taken and had as shown in the record and attached transcript, were and are as follows :

1st. The Circuit Court of Appeals handed down its opinion of reversal in the above causes on the 22d day of June, 1896.

2d. Appellee filed its petition for rehearing within the period fixed by special order of the Circuit Court of appeals, which petition was denied October 5, 1896. (Rec. 219.)

3d. On the same day and immediately following the denial of the said petition, appellee, by counsel, moved the Circuit Court of Appeals to stay its mandate, pending

application to this court for writ of *certiorari*, and said court refused to take or consider said motion and no entry thereof was made or ordered.

4th. On October 15, 1896, appellee filed with the clerk of the Circuit Court of Appeals a stipulation with counsel for appellants which constituted an agreed praecipe for the record upon which the application for writs of *certiorari* was to proceed in this court, said stipulation being addressed to the clerk of the Circuit Court of Appeals, and among other things in its direction providing, to wit:

“ *Frank E. Loveland, Clerk.*

SIR: In making a transcript of the record herein to be used by the appellee upon motions in the Supreme Court of the United States for writs of *certiorari* herein, you will follow the directions contained in the stipulation of parties this day filed in your office. The transcript under the above named directions will include” * * *.

(See stipulation, Rec., 219.)

5th. On the same day, to wit: the 15th day of October, 1896, another stipulation between counsel for appellants and appellee was filed with the clerk of the Circuit Court of Appeals and was certified to this court, said stipulation being as follows, to wit:

“ It is agreed between the appellants and the appellee herein, that the said appellee may take the record in the case of the *Louisville Trust Company* against the appellee, and the record in the case of *Louisville Banking Company* against the appellee, omitting all matter re-

ferring exclusively to the cases of the other appellants in this record, in making up the record for the application by appellee to the Supreme Court of the United States for a writ of *certiorari*; and,

“ It is further agreed that the determination of the motion for *certiorari* in said two cases shall control in all the other cases not specially named, and if the Supreme Court of the United States shall cause the writ to issue, the affirming or reversing by the Supreme Court of the United States of the judgment of the Circuit Court of Appeals in the Sixth Circuit in the said two specially named cases shall have the same effect as if all the said cases not specially named had been removed by writ of *certiorari* to the Supreme Court of the United States and by said court affirmed or reversed, and the same order of affirmation or reversal shall be entered in all the cases, as well those specially named as those not specially named.

“ It is further stipulated by the appellants and appellee that in making up the record herein for the purpose of said motions for writs of *certiorari* as aforesaid the clerk of the court shall omit from the record the answers of all the appellants except the two above specially named and their several proceedings for an appeal taken in the United States Circuit Court, District of Kentucky.

“ It is further stipulated and agreed that the said motions in the Supreme Court of the United States and said cases, if the motions should be granted, shall be heard upon the record stipulated as above, for the reason that

the pleadings and proceedings in the said two cases of the Louisville Trust Company, appellant, and the Louisville Banking Company, appellant, against the Louisville, New Albany & Chicago Railway Company, appellee, present the full issues involved in this record."

(Endorsed on back): United Circuit Court of Appeals, sixth circuit. *Louisville Trust Company et al., appellants, v. Louisville, New Albany & Chicago Railway Co., appellee.* Agreement. Filed October 15, 1896. Frank O. Loveland, Clerk."

(See Stipulation, Rec., 221.)

6th. The transcript of the record, made as stipulated and so certified, was filed in the office of the clerk of this court on November 9, 1896, and motion was made thereon on the same date for the issue of writs of *certiorari* as prayed in the petition therefor.

7th. November 14, 1896, the above appellants filed in the Circuit Court the mandates of the Circuit Court of Appeals, and thereon on the same day, the judge of said Circuit Court, having been advised of appellee's application and its pendency in this court for said writs, dismissed appellee's bill of complaint as to part, and otherwise executed the mandate as to the other defendants thereto. (See transcript hereto attached.)

8th. Two days thereafter, to wit: on November 16, 1896, this Honorable Court ordered said writs to issue, which were in due form served upon and filed with the clerk of the Circuit Court of Appeals, and with the clerk of the Circuit Court for the District of Kentucky.

9th. About November 23, 1896, the stipulation of

counsel for appellee with counsel for appellants was filed with the clerk of the Circuit Court of Appeals, therein agreeing (in substance) that the printed transcript filed in this court on November 9, 1896, should constitute the record upon which the cause under the writs of *certiorari* issued upon such record should be heard and determined by this court, and that said stipulation might constitute a return of the clerk of the Circuit Court of Appeals upon said writs of *certiorari* to this court.

(See stipulation endorsed upon or attached to said writs of *certiorari*, so certified by the clerk of the Circuit Court of Appeals now on file in this court in the above cause.)

And to show the disposition of said motion by appellee to vacate said order so dismissing its bill as aforesaid, affiant attaches hereto and submits herewith the opinion of the Circuit Court in its consideration of said motion, in and by which opinion said Circuit Court refuses to decide said motion until appellee presents the motion here offered to this Honorable court for direction and instruction to said Circuit Court, said Circuit Court having expressed the same in its opinion as follows, to wit:

“We will not, however, overrule the motion, but leave it undisposed of until the question is definitely settled as to the power of the court.”

Affiant further states that appellee was present by counsel in the Circuit Court of Appeals on the 5th day of October, 1896, at and when its petition for a rehearing in the above entitled causes was denied by said Court of Appeals, and that then and there, while said mandate

was still in the said Court of Appeals and had not been sent down to said Circuit Court for action, appellee's counsel moved said Court of Appeals to retain and stay the mandate, until appellee might present its petition to this court for a writ of *certiorari* as it then proposed to and thereafter did, and that said Court of Appeals by its then and there acting Chief Justice, refused to take or consider said motion, and that thereafter the foregoing stipulations were made and entered into by and between the counsel for appellee and counsel for appellants, by which stipulation it was expressly agreed that the above entitled causes should be tried upon the record as therein expressly agreed, provided writs of *certiorari* were ordered to issue as aforesaid.

G. W. KRETZINGER.

Subscribed and sworn to before me this twenty-fourth day of February, 1897.

WM. S. KINNAN,

[SEAL.]

Notary Public.

TRANSCRIPT.

UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF
KENTUCKY.

NOVEMBER, 14, 1896.

The Louisville, New Albany & Chi- Railway Co.,	}
<i>Complainants,</i>	
<i>vs.</i>	
The Ohio Valley Improvement Co., &c.,	}
<i>Defendants.</i>	

This day came the defendants, the Louisville Trust Company, W. C. Nones and Bernard Hollman, by St. John Boyle, their counsel; and also came the Kentucky National Bank, by Humphrey & Davie, its counsel; and also came the Louisville Banking Company and Theodore Harris, by Barnett, Miller & Barnett, their counsel; and also came Ben C. Weaver, Jr., John H. Leathers, James A. Shuttleworth, John T. Bate, Jr., M. A. Huston, A. J. Ross, W. M. Charleton, B. A. Duerson, Ronald Whitney, R. L. Whitney, S. A. Cannon, W. H. Dillingham, and Abraham Schwabacker, by Noble & Sherley, their counsel, and the opinion of the United States Circuit Court of Appeals for the Sixth Circuit, upon the appeals prosecuted by the said defendants, and the mandates of the Circuit Court of Appeals thereon having been duly filed in this court, it is now, upon motion of the said parties, ordered that the bill of complaint of the said defendant be and it is hereby dismissed as to each of the said defendants, except as follows:

In case of the Louisville Banking Company, it is ordered that the decree heretofore entered be set aside, and the said defendant is directed to produce the forty-five bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Company mentioned and described in the answer of the said defendant, and the clerk of this court shall thereupon stamp or write thereon, under the guaranty of the complainant, the Louisville, New Albany and Chicago Railway Company, the following words:

“ This guaranty is binding only on the Louisville, New Albany & Chicago Railway Company as a corporation of Kentucky. It is not binding on the Louisville, New Albany & Chicago Railway Company as a corporation of Indiana or Illinois.” And the said defendant is hereby enjoined and restrained from bringing or prosecuting any suit on the said bonds against the complainant as a corporation of Indiana or Illinois.

And in the case of the Kentucky National Bank, it is ordered that the decree hereinbefore entered be set aside, and the said defendant is directed to produce in court the five bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Company, mentioned in the said defendant's pleading, and deposited and pledged to it by William Cornwall. And the clerk of the court shall thereupon stamp or write thereon, under the endorsement of the complainant's guaranty the following : “ This guaranty is binding only on the Louisville, New Albany & Chicago Railway Company as a corporation of Kentucky. It is not binding on the Louisville, New Albany and Chicago Railway Company as a corporation of Indiana or Illinois.” And the said defendant is hereby enjoined and

restrained from bringing or prosecuting any suit on the said bonds against the complainant as a corporation of Indiana or Illinois.

And with respect to the five bonds deposited and pledged to the said defendant by W. W. Jenkins, the bill of complaint will be dismissed without prejudice, unless the complainant shall within thirty days from the entry hereof amend the said bill, and make the said W. W. Jenkins a party thereto, in which event the case will be retained for further proceedings in regard thereto.

With respect to the eight similar bonds deposited and pledged to the said defendant, the bill of complaint is dismissed, and in case of each of the said defendants before mentioned, as to whom the bill is dismissed, it is done at the cost of the complainant; and it is now ordered, adjudged and decreed that each of the said defendants recover of the complainant their costs in this suit expended.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT.

November 14, 1896.

UNITED STATES OF AMERICA, }
SIXTH JUDICIAL CIRCUIT. } ss.

THE PRESIDENT OF THE UNITED STATES.

*To the Honorable, the Judge of the Circuit Court of the
United States for the District of Kentucky, Greeting:*

WHEREAS, lately in the Circuit Court of the United States for the District of Kentucky, before you, in a cause between the Louisville, New Albany & Chicago Railway Company, complainant, and the Louisville Banking Company, respondent, wherein a decree was entered on the 11th day of December, 1894, as by the inspection of the transcript of the record of the said Circuit Court which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October in the year of our Lord One thousand, eight hundred and ninety-five, the said cause came on to be heard before the United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now, here ordered; adjudged and decreed by this court, that the de-

cree of the said Circuit court in this cause be and the same is hereby reversed at costs of the appellee with directions to take further proceedings in accordance with the opinion.

JUNE 22, 1896.

You, therefore are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

COSTS OF APPELLANT:

Clerk,	\$30 10
Printing record,	24 28
Attorney	20 00

—————
\$74 38

FRANK O. LOVELAND,
Clerk of the United States
Circuit Court of Appeals
for the Sixth Circuit.

[SEAL.]

(Endorsement): United States Circuit Court of Appeals for the Sixth Circuit. No. 281, October term, 1895. *Louisville Banking Company v. New Albany & Chicago R. R. Co.* Mandate, filed November 14, 1896.

THOS. SPEED, *Clerk.*

UNITED STATES CIRCUIT OF APPEALS FOR THE SIXTH
CIRCUIT.

NOVEMBER 14, 1896.

UNITED STATES OF AMERICA, }
SIXTH JUDICIAL CIRCUIT. } ss.

THE PRESIDENT OF THE UNITED STATES.

*To the Honorable, the Judge of the Circuit Court of the
United States for the District of Kentucky,* GREETING:

Whereas, lately in the Circuit Court of the United States for the District of Kentucky, before you, or some of you, in a cause between the Louisville, New Albany & Chicago Railway Company, complainant, and the Ohio Valley Improvement and Contract Company, respondent, wherein a decree was entered on the 11th day of December, 1894, as by inspection of the transcript of the record of the said Circuit Court which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of an appeal, agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this court that the decree of the

said Circuit Court in this cause be and the same is hereby reversed, with costs and directions to dismiss the bill as to this appellant.

June 22, 1896.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and decree of this court, as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

Costs of appellant.

Clerk	\$31.85
Printing record	24.28
Attorney	20.00
	<hr/>
	\$76.13

FRANK O. LOVELAND,
Clerk of the United States
Circuit Court of Appeals
for the Sixth Circuit.

[SEAL.]

(Endorsement): United States Circuit Court of Appeals for the Sixth Circuit. No. 277, October Term, 1895. *Louisville Trust Co. v. Louisville, New Albany & Chicago Railway Co.* Mandate. Filed November 14, 1896. Thos. Speed, Clerk.

UNITED STATES CIRCUIT COURT DISTRICT OF KENTUCKY.

DECEMBER 1, 1896.

Louisville, New Albany and Chicago Railway Company
v.
Louisville Trust Company, etc.

Came complainant, by counsel, and filed herein a copy of the order of the Supreme Court of the United States granting writ of *certiorari* to the United States Circuit Court of Appeals, Sixth Circuit, in this cause, and thereupon the complainant, by counsel, moved the court to set aside the orders entered herein on the 14th day of November, 1896, to which the defendants, by counsel, objected, and said motion was submitted, and, the court not being advised, takes time.

SUPREME COURT OF THE UNITED STATES.

Nos. 645 and 646, October Term, 1896.

The Louisville Trust Company,	}
<i>Appellant,</i>	
<i>vs.</i>	
The Louisville, New Albany & Chi-	}
cago Railway Company.	

The Louisville Banking Company,	}
<i>Appellant,</i>	
<i>vs.</i>	
The Louisville, New Albany and Chi-	}
cago Railway Company.	

ON A PETITION for writs of *Certiorari*, to the United States Circuit Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the petition for writs of *Certiorari* herein to the United States Circuit Court of Appeals, for the Sixth Circuit, and of the argument of counsel, in support of the same.

It is now here ordered by the court that said petition be and the same is hereby granted.

November 16, 1896.

A true copy.

Test: JAMES H. MCKINNEY,

[SEAL.] *Clerk of the Supreme Court of the United States.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF KENTUCKY.

Louisville, New Albany and Chicago Railway Company	}
<i>vs.</i>	
Louisville Trust Company <i>et al.</i>	}

George W. Kretzinger, on oath states that he is the general counsel of the above complainant, and as such is fully authorized to make this affidavit.

Affiant further states that on the 22d day of June, 1896, the Circuit Court of Appeals for the Sixth Circuit, by its decision on that date rendered, reversed the decree of this court, and thereafter, to wit: on October 5, 1896, the petition for a rehearing of said cause by said Circuit Court of Appeals was overruled and the motion to modify the mandate was denied; that thereafter, to wit: on the 12th day of October, 1896, the defendants in the above entitled cause, as appellants in the Circuit Court of Appeals, were notified by written notice that the Louisville, New Albany and Chicago Railway Company would on the 9th day of November, 1896, file its petition in the Supreme Court of the United States and move thereon for the issuance of a writ of *certiorari* to said Circuit Court of Appeals, said notice and the acceptance thereof being hereto attached marked Exhibit A. And thereafter, to wit: on October 15, 1896, a certain stipulation was made touching the preparation of the record to be certified by the clerk of the Circuit Court of Appeals to the Supreme Court, upon which the petition and motion for writ of

certiorari should proceed, and also providing in said stipulation that if the writ issued the cause should be heard and considered by the Supreme Court upon said agreed record, a copy of said stipulation being hereto attached marked Exhibit B; that said stipulation was certified into said record by the Clerk of the Circuit Court of Appeals as the same now appears on file in the Supreme Court, pursuant thereto and in conformity therewith.

Affiant further states that said record was made up and certified by the Clerk of said Circuit Court of Appeals pursuant to said stipulation and another stipulation of numerous other matters to be contained in said record signed by counsel of the same date; that thereafter, to wit: on November 9, 1896, said record and thereon the petition and motion for a writ of *certiorari* as in said petition prayed were filed in said Supreme Court, and the said motion for said writ upon said petition and record were then and there submitted to said Supreme Court for its consideration and decision, a copy of said motion being hereto attached, marked Exhibit C; that one week after said submission, to wit: on the 16th day of November, 1896, said Supreme Court granted said motion and ordered the issuance of said writ, which more fully appears in the certified copy of said order now on file in the above entitled cause in this court, to which reference is hereby made; that two days before the entry of said order in the said Supreme Court, to wit: November 14, 1896, and upon the mandate of said Circuit Court of Appeals and on motion of counsel for appellants in said mandate, this Honorable court entered judgment in the above entitled cause, dismissing the bill

of complaint; that said writ was promptly issued and sent by the clerk of the Supreme Court to affiant, and upon its receipt affiant mailed the same to James S. Pirtle, at Louisville, Kentucky, he being one of counsel of the Louisville, New Albany & Chicago Railway Company in the above entitled cause, and affiant is informed that the said writ was sent by said Pirtle to the clerk of the Circuit Court of Appeals with a stipulation to the effect that the record so certified by him and filed in the Supreme Court as aforesaid, should constitute his return to said writ; that thereafter, to wit: on December 1, 1896, complainant by counsel appeared in this Honorable Court and moved that said order or judgment of dismissal be set aside, and this affidavit is made in support of said motion, and so as to submit to this court the various steps taken and their respective dates.

G. W. KRETZINGER.

Subscribed and sworn to before me, on this 2nd day of December, 1896.

WM. S. KINNAN,

[SEAL.]

Notary Public.

(The exhibits above referred to are the stipulations heretofore set out, and therefore are here omitted.)

[Certificate of clerk of Circuit Court, for District of Kentucky.]

UNITED STATES CIRCUIT COURT, DISTRICT OF KENTUCKY.

L. N. A. & C. Ry. Co. }
 vs.
 Louisville Trust Company. }

OPINION ON MOTIONS.

The Louisville, New Albany & Chicago Railway Company obtained a judgment against the Louisville Trust Company and others in this court, which declared that a guaranty which was endorsed upon certain coupon bonds issued by the Richmond, Nicholasville & Beattyville Railway Company, by said Louisville, New Albany & Chicago Railway Company was *ultra vires* and invalid, and which directed that the guaranty thereon should be canceled, and the injunction which was originally granted, preventing the transfer of said bonds with the guaranty thereon, was made perpetual. From this judgment the Louisville Trust Company and others, holders of said bonds appealed to the Circuit Court of Appeals, and that court reversed the judgment of this court, holding that the guaranty was invalid as to the appellants, and directed by mandate that the bills filed by the L., N. A. & C. Ry. Co., should be dismissed with costs. The mandates of the Circuit Court of Appeals in the several cases were dated October 8, 1896, and filed in this court on November 14, 1896, and on the same day, pursuant to and in obedience to said mandates, on motion of the appellants, an order was entered by this court dismissing the bills, with costs in favor of the several appellants except the Louisville Banking Company, the Kentucky National

Bank and W. W. Jenkins. On December 1, 1896, the L., N. A. & C. Ry. Co. filed an affidavit of its counsel, together with a copy of the order of the Supreme Court of the United States granting a writ of *certiorari* to the United States Circuit Court of Appeals for this circuit in the cause, and moved this court to set aside the order of dismissal entered on the 14th of November, 1896. This affidavit is accompanied with a copy of said order as stated, attested by the clerk of the Supreme Court of the United States, showing that the writ of *certiorari* was granted on the 16th day of November, 1896, to the Circuit Court of Appeals of this circuit. It also appears from the statement of said affidavit that notice of the fact that an application would be made on the 9th day of November, 1896, to the Supreme Court by the L. N. A. & C. Ry. Co. for a writ of *certiorari* was accepted by counsel for defendants on the 12th of October, 1896, and that such motion was made on the 9th of November, 1896, to the Supreme Court of the United States and granted on the 16th of November, 1896. When the original bill was filed against the several parties an injunction bond was executed by the complainant, the Louisville, New Albany and Chicago Railway Company to the several parties who were then defendant, the condition of which was that the obligors therein would pay to the obligees, or such of them as might be damaged by the injunction then granted, such damages as they, he or it might sustain by reason of the issuing of said injunction, if it be finally decided that said injunction ought not to have been granted; and when the bill was amended bringing

in other parties, another injunction bond was executed by complainant, with security conditioned as in the first bond. On the second of February, 1897, the defendants, The Louisville Trust Company and others, obligees in the said injunction bonds, moved the court to refer the case to a special master to hear and determine as to what damage, if any, said obligors of said bond shall pay to said obligees therein and report the same to the court for action thereon. Both of these motions have been submitted.

It will be seen from this brief statement of the facts that the writ of *certiorari* which issued from the Supreme Court was issued to the Circuit Court of Appeals and not to this court, nor has that court made any order upon this court in regard to its action. The motion of the Louisville, New Albany & Chicago Railway Company, to have this court set aside the order entered on the 14th of November, 1896, is upon the theory that this court still has control over the judgment then entered, as the motion to set it aside was made during the same term, and that the effect of the *certiorari* issued by the Supreme Court of the United States upon the Circuit Court of Appeals is to set aside the action of the Circuit Court of Appeals, and the action of this court thereunder, and leave the cause as if it had gone up upon appeal directly to the Supreme Court.

We have been unable to find any ruling of the Supreme Court or any established practice in regard to the effect upon the trial court of a writ of *certiorari* granted as in this case. The act of March 3, 1891, provides that "whenever on appeal or writ of

error or otherwise a case coming directly from the District Court or existing Circuit Court shall be reviewed and determined in the Supreme Court, the cause shall be remanded to the proper District or Circuit Court for further proceedings to be taken in pursuance of such determination." "Whenever on appeal or writ of error, or otherwise, a case coming from a District or Circuit Court, shall be reviewed and determined in the Circuit Court of Appeals in a case in which the decision in the Circuit Court of Appeals is final, such cause shall be remanded to the said District or Circuit Court for further proceedings to be taken in pursuance of such determination." And it provides in another section: "That in any case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." And in another provision: "Whenever on appeal or writ of error or otherwise a case coming from a Circuit Court of Appeals shall be reviewed and determined in the Supreme Court, the cause shall be remanded by the Supreme Court to the proper District or Circuit Court for further proceedings in pursuance of such determination." Thus the act of Congress gives the Circuit Court of Appeals in those cases over which they have appellate jurisdiction and can enter a final judgment, plenary power to remand the case to the inferior court with such direction as they might determine. This mandate thus entered must be

obeyed by the inferior court unless it has been suspended or superseded by a *certiorari* from the Supreme Court for the purpose of review or determination. This statute, whilst it gives full power to the Supreme Court to remand to the trial court for such proceedings as may be proper to carry out the final judgment of that court is silent as to what should be done in the interim between the adjudication by the Circuit Court of Appeals and the final adjudication by the Supreme Court. It must, of necessity, be still a pending suit, and the parties must by the terms of the act of 1891 be subject to the final adjudication of the Supreme Court. Here we have an injunction granted originally by the trial court and the relief granted upon final hearing, the case taken to the Circuit Court of Appeals and there an adjudication reversing the case with a mandate issuing from that court directing this court to dismiss the bill, and with it the injunction, with costs, and the enquiry is whether this court can now whilst the case is pending in the Supreme Court set aside this order entered under the mandate of the Circuit Court of Appeals.

At common law the writ of *certiorari* is used for two purposes, first as an appellate proceeding for the re-examination of some action of an inferior tribunal and second as an auxiliary process to enable the court to obtain further information in respect to some matter already before it for adjudication. It is for the latter purpose that the writ has been usually employed by the Supreme Court. The removal of a proceeding by writ of *certiorari* at common law might have been both before and after

final judgment. Here by the terms of the statute the Supreme Court has the same authority over a cause removed by *certiorari* as if it had been carried there by appeal or writ of error. The authorities at common law seem to differ somewhat as to whether in addition to the writ of *certiorari* an order of *supersedeas* should be issued to or by the inferior court. Perhaps the better authorities are that the *certiorari* when awarded and notice thereof given was in itself a *supersedeas*. We think this is the effect of the *certiorari* granted under the act of 1891 by the Supreme Court.

In the case of *Ewing v. Thompson*, 43 Penna. St., Rep., Judge STRONG, afterwards Justice STRONG of the Supreme Court, in discussing the effect of a writ of *certiorari*, speaking for the Pennsylvania Supreme Court, says:

"Very many English as well as American authorities are collected in *Patchen v. the Mayor of Brooklyn*, 13 Wend., 664. There are very many others all holding a common law writ of *certiorari*, whether issued before or after judgment, to be in effect a *supersedeas*. There are none to the contrary. In some of them it is ruled that action by the inferior court after the service of the writ is erroneous, in others it is said to be void and punishable as a contempt. They all, however, assert no more than the power of the tribunal to which the writ is suspended by it, that the judicial proceedings can progress no further in the lower court."

In *McWilliams v. King*, 32 N. J. L., 23, it is held, that at common law a *supersedeas* was issued by the in-

ferior court after the *certiorari* was awarded, but the New Jersey practice was for the superior court to issue the *supersedeas*. And the court, in the course of its opinion, said: "But it is to be remembered that the writ of *certiorari* is of itself and *proprio vigore* a *supersedeas*. Neither the inferior court nor the officer holding the process of such inferior court can rightfully proceed after formal notice of its having been issued. Every act done after such notice is not only irregular but absolutely void, and the parties doing such acts are trespassers."

See also,

2d Hawkins, P. C., p. 400 to 406.

1 Bacon's Abridgment, Certiorari, G.

Comyn's Digest, Certiorari, G.

It would seem from this view that after a *certiorari* was issued by the Supreme Court the authority and power of the Circuit Court of Appeals over the proceedings was at least suspended. I find in the *Union Pacific Railway Co. v. Chicago*, 163 U. S., 543, this language used by the Supreme Court in noticing a point, which had not been raised in the Circuit Court nor assigned for error to the decree in the Circuit Court of Appeals, viz.: "It is indeed admitted that the point is raised for the first time in this court. We have to determine in this appeal whether in our judgment the Circuit Court of Appeals did or did not err, and affirm or reverse accordingly. It is true that our decision necessarily reviews the decree of the Circuit Court in reviewing the action of the Court of Appeals upon it, and under the statute our mandate goes to the Circuit Court directly, but it is notwithstanding

the judgment of the Circuit Court of Appeals that we are called upon primarily to review. It will be seen, then, that the judgments of the Circuit Court of Appeals should not ordinarily be re-examined on the suggestion of error in that court, in that it did not hold the action of the Circuit Court erroneous, which was not complained of. We will, however, make a few observations on the point thus tardily presented." In this case there was an *appeal* from the Circuit Court of Appeals.

In the case of *Telfener v. Russ*, 162 U. S., 170, a writ of *certiorari* was issued by the Supreme Court to the Circuit Court of Appeals, and the case brought there in that way. In that case the judgment of the Circuit Court was affirmed by the Circuit Court of Appeals and reversed by the Supreme Court. The order is that "the judgment of the Circuit Court of Appeals should be reversed, and the cause remanded with directions to set aside the verdict and grant a new trial." It does not appear from the report of the case whether the mandate went to both the Circuit Court of Appeals and the Circuit Court, or only to the Circuit Court.

We conclude in the absence of any ruling or decision of the Supreme Court, that the effect of a *certiorari* when awarded in a cause decided by the Circuit Court of Appeals is to suspend any action that that court may take or any action that might be taken by the trial court in obedience to the mandate of the Circuit Court of Appeals after the *certiorari* is awarded, but it does not restore jurisdiction to the Circuit Court, nor does it give that court any authority to set aside orders legally and prop-

erly made before the writ of *certiorari* is awarded. It however suspends any further action by the Circuit Court of Appeals or by the trial court in obedience to the adjudication of the Circuit Court of Appeals after the writ has been awarded, or at least when the court is notified of the issuing of the writ of *certiorari* by the Supreme Court and its service upon the Circuit Court of Appeals.

It may be that in this case the original complainants may suffer loss and inconvenience by the condition in which this record is, and it might be desirable for some rule to be established by the Supreme Court or the Circuit Court of Appeals, by which the judgment of the Circuit Court might be suspended upon proper conditions when there is to be an application for a writ of *certiorari* to the Supreme Court, but we are strongly inclined to the opinion that this court in the present condition of the record cannot grant the order to set aside the judgment entered dismissing the complainant's bill. We will not, however, overrule the motion but leave it undisposed of until the question is definitely settled as to the power of the court.

The fact that notice for an application for a writ of *certiorari* was accepted by the counsel for defendants on the 12th of October, 1896, and the motion had actually been made in the Supreme Court before the order of dismissal was entered, does not, we think, affect the question of the court's authority now to set aside such order.

The motion of the defendants of the 2d of February, to refer these cases to have the damages ascertained, must, for the reason already given, be overruled, and for

the further reason that, by the terms of the injunction bond, damage was only to be recovered if it be *finally* decided that the injunction ought not to have been granted, and in this case it has not been finally decided, but is still pending in the Supreme Court. We do not now express any opinion as to whether or not damages could be ascertained in the mode suggested by this motion.

This motion of defendants will be overruled, and no order made in the other motion at present.

Points and Authorities in Support of the Foregoing Motion.

This motion is most important because it involves a question of practice which may frequently arise under the Court of Appeals act, but which has not yet been determined by this court. Thus the Circuit Court retained and continued appellee's motion to vacate the order dismissing its bill to permit this motion to be made for the direction and instruction by this court to the Circuit Court, which will establish the proper practice in like proceedings had in the future under that act.

It is manifest, that if it is the opinion of this court that appellee would loose no rights if this court should reverse the judgment of the Court of Appeals and affirm the decree of the Circuit Court, notwithstanding the dismissal of appellee's bill under the mandate of the Circuit Court of Appeals, no necessity for the allowance of this motion would exist. But if the intervention of several terms of the Circuit Court between the order of dismissal and final action by this court if favorable to appellee would in any wise complicate or embarrass the execution of the final mandate of this court in the Circuit Court, appellee ought to be relieved therefrom by the allowance of its motion to direct the Circuit Court to restore its bill, *but in either view*, the practice under the Court of Appeals act should be fully settled by this court upon this motion.

I.

1st. The record came to this court from the Court of Appeals under stipulation as to what it should contain and under the further stipulation that if this court ordered the issue of the writs of *certiorari* then these causes should be reviewed and determined upon such stipulated record.

2nd. November 9, 1896, appellee filed its stipulated record in this court, with its petition and motion thereon for writs of *certiorari* and on that day the motion for such writs was made and taken under advisement.

3d. November 14, 1896, and during the pendency of the motion in this court for the issuance of the writs of *certiorari* the Circuit Court, pursuant to the mandate of the Court of Appeals dismissed appellee's bill and at the same term of the Circuit Court appellee moved to vacate such order of dismissal.

4th. Two days after the entry of this order of dismissal, to wit: on November 16, 1896, this court ordered the writs to issue, and the decree with certified copy of the order therefor were promptly filed in the Circuit Court and Court of Appeals.

In this state of the case the Circuit Court held that under the mandate of the Circuit Court of Appeals it had no discretion but was compelled to dismiss the bill as therein directed and was without authority to vacate the order of dismissal upon appellee's motion notwithstanding the issue of the writs of *certiorari* without direction and instruction from this court, which the Circuit Court will await before further action upon appellee's motion to restore its bill to the record, there to remain pending the review and final disposition of the case by this court.

" It may be that in this case, the original complainants

may suffer loss and inconvenience by the condition in which this record is, and it might be desirable for some rule to be established by the Supreme Court of the Circuit Court of Appeals, by which the judgment of the Circuit Court might be suspended upon proper conditions when there is to be an application for a writ of *certiorari* to the Supreme Court, but we are strongly inclined to the opinion that this court in the present condition of the record cannot grant the order to set aside the judgment entered, dismissing the complainant's bill. *We will not however overrule the motion* but leave it undisposed of *until* the question is definitely settled as to the power of the court."

The effect of the opinion of the Circuit Court justifies the Court of Appeals in its refusal upon appellee's motion to stay its mandate, and there are no express words in the Court of Appeals Act which would sustain a contrary view. In its opinion upon this point, the Circuit Court said :

"This statute, whilst it gives full power to the Supreme Court to remand to the Trial Court for such proceedings as may be proper to carry out the final judgment of that court, is silent as to what should be done in the interim between the adjudication by the Circuit Court of Appeals and the final adjudication by the Supreme Court. It must of necessity be still a pending suit, and the parties must, by the terms of the Act of 1891, be subject to the final adjudication of the Supreme Court."

In this state of the law, the Circuit Court holds that it will withhold its action upon appellee's motion *until* it can be directed and instructed by this court.

The second paragraph of section 6 of the Court of Appeals Act provides:

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require by *cer-*

tiorari or otherwise; any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court,"

Section 10 provides among other things:

"That whenever on appeal or writ of error or otherwise a case coming directly from the District Court or existing Circuit Court shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper District or Circuit Court for further proceedings to be taken in pursuance of such determination."

Under these provisions, upon the removal of a cause from the Court of Appeals to this court for review, by writ of *certiorari* or otherwise, this court acts directly with the trial court, in the same manner it would have done had such cause been brought directly from such trial court.

Thus the Court of Appeals, in that class of cases, is eliminated, leaving the Circuit Court directly subject to the supervision of this court, and this court now acts upon the record and the Circuit Court as though the Court of Appeals act did not exist.

It would seem too clear to require argument that this and not the Court of Appeals must protect the *status* of the case in the Circuit Court, so that its mandate upon its final judgment will not become incapable of enforcement in any degree or matter.

II.

At common law the Superior Court not only issued its writ of *certiorari* to the inferior court, but also sent to such inferior court its mandate for enforcement of its final judgment. As we have shown, this cannot be done under the Circuit Court of Appeals act.

The practice at common law however, was to apply to the Superior Court issuing the writ for orders necessary to maintain the status of the case pending the review by the Superior Court of the record brought to it by its writ of *certiorari*.

In *Bilderback v. Moore*, 17 N. J. L. (2 Harrison), page 510, after an execution had been issued in the trial court, the Superior Court issued a writ of *certiorari*, and, on motion, entered a rule to stay proceedings on the execution.

The same rule was entered, on motion, in *Allen v. Shurts*, 16 N. J. L. (1st Harrison), 221.

It cannot be said that if the trial court acts upon the mandate of the Circuit Court of Appeals before this court issues its writ of *certiorari*, the petitioner for the writ loses his right to have his case reviewed thereon by this court. If that were true his right to such review under the Circuit Court of Appeals act would depend upon the race between the losing and winning litigant. If the latter should reach the trial court with his mandate and secure entry of order for its enforcement, even a day before the former could reach this court with his record for application for supersedeas made to stay, etc., his right would be determined.

This court having determined the right of appellee to the writs of *certiorari*, and therefore its right to a review and final determination of causes in this court, is it not clearly entitled to the allowance of this motion, and thus place its bill back upon the docket of the Circuit Court to remain pending the final action of this court?

Observe that the order of dismissal, and the motion to vacate the same were entered and made at the same term.

Doss v. Tyack, 14 How., 428.

Bronson, etc. v. Schultz, et al., 14 Otto,
797.

III.

Did not the stipulated record and the agreement of counsel for appellants, that if the writs of *certiorari* were ordered the causes should be reviewed and determined by this court thereon, constitute an express agreement to suspend any action by appellant upon the mandate of the Circuit Court of Appeals?

This court, upon the stipulated record, having determined the right of appellee to the writs of *certiorari*, and that, therefore, it was entitled to a review and final determination of these causes, is it not clearly entitled to the allowance of this motion by virtue of these stipulations, without reference to the Circuit Court of Appeals act?

The stipulation here presented, as performed, operated to transfer the record from the Circuit Court of Appeals to the Supreme Court, not only for the application for writ of *certiorari* but for final hearing upon the merits in case the writ was issued, and this transfer was, by agreement of the parties, completed November 9, 1896, the date of its filing in the Supreme Court. Such record when certified and filed in the Supreme Court pursuant to this stipulation was as provided therein to remain for two purposes: (1st) for the petition for the writ, and (2d) for review by the Supreme Court in case the writ was allowed.

We submit that even if it had been the settled practice that appellee upon its application to this court for the issuance of the writs of *certiorari* should at the same time

have moved for the immediate issue of an order staying the mandates of the Circuit Court of Appeals pending such application, these stipulations and adherence thereto by counsel for appellants would have rendered such motion unnecessary.

Without in any degree imputing any unfairness on the part of counsel in their subsequent insistence for judgment of dismissal upon the mandate of the Circuit Court of Appeals, we submit that the motion upon such mandate to dismiss was not in accord with the stipulation. On the contrary, it would seem clear that such motion and its allowance would tend to defeat or complicate one of the purposes expressed in the stipulation, because the only purpose counsel could have in obtaining the dismissal was to get the case out of the jurisdiction of the Circuit Court, or beyond the effect of the remanding order of this court in case it should reverse the judgment of the Circuit Court of Appeals and affirm the decree of Circuit Court. At least it does not seem consistent with the agreement in the stipulation that the case should be heard on the record as agreed, and provided for, to move upon the mandate in the Circuit Court after such agreed record had been filed in the Supreme Court.

Clearly such dismissal of the bill could have no other purpose or intended effect than to avoid at least the suspensive force of the issuance of the writ of *certiorari*.

We again disaffirm any purpose here to charge counsel in the least decree with any intention on their part to unfairly violate or disregard the terms of the stipulation. But we can not see otherwise than that the motion and judgment of dismissal would, of necessity, operate to defeat

the express purpose of the stipulation as above shown, especially if such judgment of dismissal is to have the effect of setting the defendants to the bill free to pursue any possible remedy or to take any possible step touching the subject-matter of this litigation, which they could not have pursued or taken if the judgment of dismissal had not been entered and the writ of *certiorari* did not suspend the mandate of the Circuit Court of Appeals.

It is manifest that the New Albany Company is entitled to have this judgment of dismissal vacated that they may have the full benefit of the writ and the review and ultimate decision of the Supreme Court upon the merits, without subjecting itself to any of the possible complications that might occur, if the judgment of dismissal continues in full force and effect beyond the term of its entry.

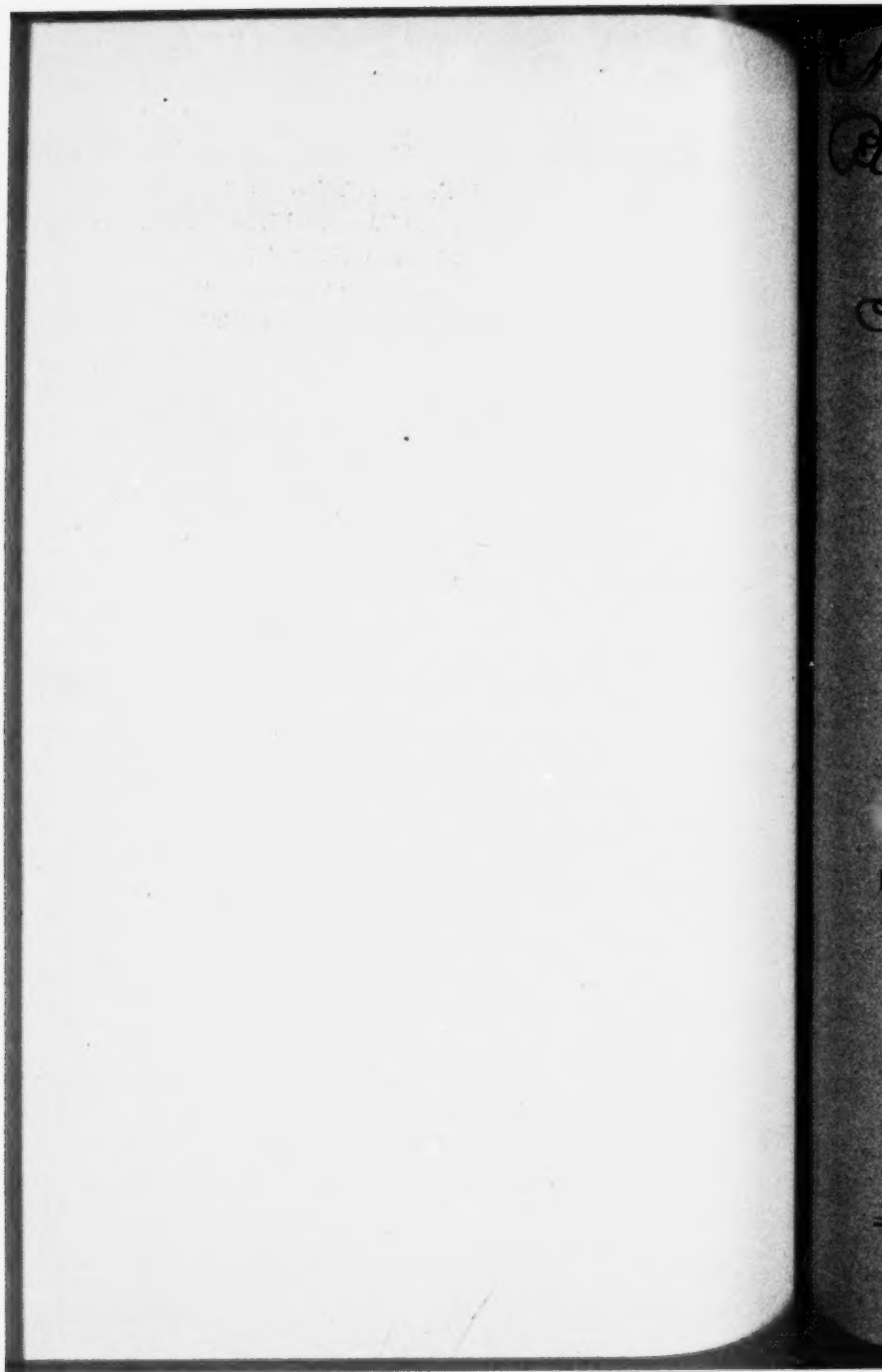
Respectfully submitted.

GEO. W. KRETZINGER,

E. C. FIELD,

JAMES S. PIRTLE,

Solicitors for Appellee.



Exh. 207. 29.

By *G. W. Kretzinger & E. C. Field*
IN THE
for *Appellee* (on ans.)
Supreme Court of the United States,

OCTOBER TERM, A. D. 1896
Filed *Mar. 20, 1897.*

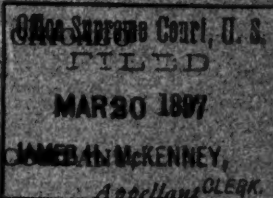
THE LOUISVILLE TRUST COMPANY,

Appellant,

vs.

No. 645.

LOUISVILLE, NEW ALBANY &
RAILWAY COMPANY



THE LOUISVILLE BANKING

vs.

No. 646.

LOUISVILLE, NEW ALBANY & CHICAGO
RAILWAY COMPANY.

Reply to Appellants' Brief against Appellee's
Motion to direct the Circuit Court to Vacate
Order Dismissing Appellee's bills, etc.

GEO. W. KRETZINGER,

E. C. FIELD,

JAMES S. PIRTLE,

*For Louisville, New Albany & Chicago
Railway Company, Appellee.*

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

THE LOUISVILLE TRUST COMPANY,

Appellant,

v/s.

No. 645.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY.

THE LOUISVILLE BANKING COMPANY,

Appellant.

v/s.

No. 646.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY.

**Reply to Appellants' Brief against Appellee's Motion
to direct the Circuit Court to Vacate Order
Dismissing Appellee's bills, etc.**

It appears from the record that the bill was filed by appellee in the Circuit Court to have its alleged guaranty on the Beattyville bonds adjudged void.

On final hearing the Circuit Court by final decree so adjudged.

Appellant appealed to the Circuit Court of Appeals, on bond for costs.

That court reversed the decree, with costs, as to appel-

lants, and directed the Circuit Court to dismiss the bill as to them and some others.

Thus no money except for costs was decreed.

The order for the injunction upon appeller's bill recites:

"And orders an injunction to issue pursuant to the prayer of the bill, upon complainant filing bond conditioned according to law, in the penal sum of fifty thousand dollars, with security to be approved by the district judge or clerk of this court."

Transcript, p. 22.

Then follows an order approving the bond and sureties given and offered by appellee in the amount required.

Transcript, p. 22.

Counsel concede that if this court should reverse the judgment of the Circuit Court of Appeals the mandate of this court would vacate the order of dismissal and effectively restore appellee's bill.

They contend, however, that the purpose of this motion is to keep alive and retain in full force the injunction heretofore granted by the trial court upon appellee's bill.

I.

In reply we submit:

1st: This court will presume that this injunction bond was ordered in a sufficient amount, to fully protect appellants and that it still remains in full force and effect.

Counsel neither claim nor intimate the contrary.

The gist of counsel's insistence is that appellee should be required to give *another* injunction bond in this court.

The rule is well settled, however, that the Appellate Court will not review the exercise of the discretion of the Circuit Court in fixing the penalties or approving the sureties of such bonds.

Therefore it must be conclusively presumed that appellants are abundantly protected by this required and approved bond against any and all damage caused by the issuance of the injunction, if this court should finally affirm the judgment of the court of appeals.

Suppose counsel had moved this court to require appellee to give bond before the issuance of these writs. Would this court have so ordered, notwithstanding the court of appeals act does not require any bond in such cases?

Suppose the Circuit Court of Appeals had affirmed the final decree of the Circuit Court, and appellants had brought the record to this court for review on writ of *certiorari*, would they have been required to give further bond for costs or for damages to appellee?

Answers to these queries fully reveal the fallacy of counsel's contention.

Our contention is that we are entitled to this motion because:

- (a) The application for the writ was promptly made.
- (b) It was made by stipulation for record upon which should be had final hearing in case the writ should issue.
- (c) Appellants have full statutory protection in the injunction bond required by the trial court.
- (d) That under the Circuit Court of Appeals Act, appellee is entitled to the writ *certiorari* in a proper case (and this court has held appellee entitled thereto) without bond and upon its issue is entitled to a review of the record without further assignment of error, from which it conclusively follows that appellee is equally entitled to the full benefit of the reversal of the judgment of the Circuit Court of Appeals, if this court should reverse.

2. Counsel clearly misinterpret the scope of our motion. We simply move this court to direct the vacation of the order dismissing the bill and thereby to place the case in the condition of its record at the date of granting the application to this court for the writ.

3. We have not moved or asked this court to grant any order touching the injunction issued by the trial court.

II.

Judge BARR held in his opinion upon this motion (see opinion on motion, page 26), that "perhaps the better authorities are that the *certiorari* when awarded and notice thereof given was in itself a supersedeas. We think this is the effect of the *certiorari* granted under the act of 1891 by the Supreme Court."

Judge BARR then cites, quotes and approves *McWilliams v. King*, 32 N. J. L., 23, in which the court held:

"That everything done after such notice is not only irregular but absolutely void, and the parties doing such acts are trespassers."

Therefore we did not move this court to make this writ of *certiorari* a supersedeas, because as held in *McWilliams v. King*, *supra*, "the writ of *certiorari* is of itself and *proprio vigore* a supersedeas."

We moved the court to *undo* that which the Circuit Court did, after our record was in this court and our application for the writ was before it and only two days before it was issued.

This situation is in perfect analogy with that in *Bilderback v. Moore*, 17 N. J. L., (2 Har.), 510 and *Allen v. Shurtz*, 16 N. J. L., (1 Har.), 221.

In those cases execution was issued *after* the application for but *before* the *certiorari* issued, and *on motion* the courts ordering the writs *stayed* the execution in the court below.

It follows therefore, that the Slaughterhouse cases (10 Wall., 273), and other cases cited by counsel, under point 1 of their brief, are not in point and do not in the least degree bear upon *this* motion.

III.

Counsels' construction of the stipulations would necessarily eliminate many of their recitals, to which they studiously avoid any reference whatever. They insist that our construction extends the stipulation to matters not covered by it. We quote one clause (Transcript, page 221):

"It is further agreed that the determination of the motion for *certiorari* in said two cases shall control in all the other cases not specially named, and if the Supreme Court of the United States shall cause the writ to issue the affirming or reversing by the Supreme Court of the United States of the judgment of the Circuit Court of Appeals in the Sixth Circuit in the said two specially named cases shall have the same effect as if all the said cases not specifically named had been removed by writ of *certiorari* to the Supreme Court of the United States and by said court affirmed or reversed. * * *

"It is further stipulated and agreed that the said motions in the Supreme Court of the United States and said cases, if the motions should be granted, shall be heard upon the record stipulated as above," etc.

Thus this is an express agreement to transfer the stipulated record to this court, to make it the record for the application for the writ and upon its issue to make it the record for the final consideration and judgment of this court thereon, and such judgment when rendered by this court was to be entered in the other cases not brought to this court by *certiorari*.

Did not the dismissal of this bill, even for the purpose contended by counsel, violate this stipulation and its clearly expressed purpose?

This stipulation was a submission of the stipulated record by counsel for appellant, not only for the determination of the application for the writ, but for final disposition if the writ should issue.

I V .

6. Counsel conclude by insisting that this court should require appellee to give another injunction bond.

We have shown that one satisfactory to the Circuit Court in penalty, condition and surety is still in force and effect.

So no hardship is present to demand the repetition of that bond in this court, even if this court had full authority under the Circuit Court of Appeals Act to require a bond of that character in cases brought to this court by writs of *certiorari*.

The statutes of many of the states provide that an appeal from a decree dismissing an injunction bill will not continue the injunction without an order to that end entered by the trial or by the Appellate Court.

Yet counsel have not presented a single case in which the court held that a second injunction bond was required before entry of an order to continue the injunction pending the appeal.

The injunction bond already in force extends from the issue of the injunction to the final disposition of the case, and counsel have neither submitted any statute or decision of any court providing or holding that the defendant was entitled to two injunction bonds, with like conditions to secure the defendant against the same damages.

Unless this court holds that its judgment of reversal, if so rendered, would displace every order or judgment adverse to appellee entered or made subsequent to the final decree of the trial court whether made by the Circuit Court of Appeals or the trial court upon its mandate, this motion should be granted.

Respectfully submitted.

G. W. KRETZINGER.

E. C. FIELD.

JAMES S. PIRTLE.

No. 254 & 255.

NOV 8 1897
JAMES H. MCKENNEY,
CLERK

Brief of Kretzinger & Field for Appellant

Supreme Court of the United States,

OCTOBER TERM, A. D. 1897.

Filed Nov. 8, 1897.

THE LOUISVILLE TRUST COMPANY,

Appellant,

254.

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,

Appellee.

THE LOUISVILLE BANKING COMPANY,

Appellant,

255.

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,

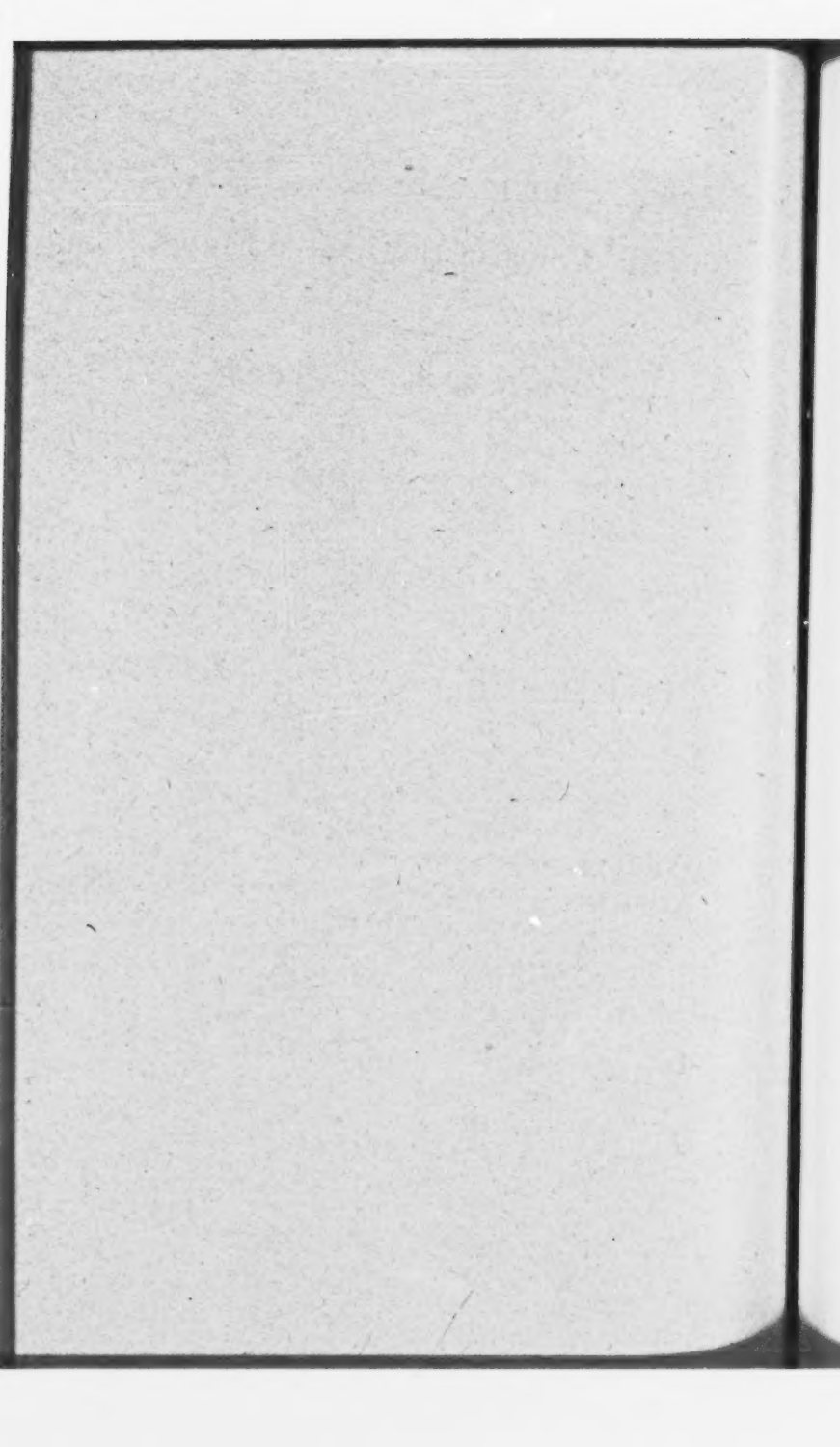
Appellee.

On Writs of *Certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit.

**STATEMENT OF FACTS, STATUTES INVOLVED,
ASSIGNMENT OF ERRORS AND ARGUMENT
FOR APPELLEE.**

G. W. KRETZINGER,
E. C. FIELD,
JAMES S. PIRTLE,

Solicitors for Appellee.



IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE LOUISVILLE TRUST COMPANY,
vs.
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,

Appellant,
Appellee.

THE LOUISVILLE BANKING COMPANY,
vs.
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY,

Appellant,
Appellee.

On Writs of *Certiorari* to the United States Circuit Court of Appeals, for the Sixth
Circuit.

STATEMENT OF FACTS, STATUTES INVOLVED, ASSIGNMENT
OF ERRORS and ARGUMENT FOR APPELLEE.

Appellee brought this suit in chancery in the Circuit Court of the United States for the District of Kentucky, alleging it was at that time a corporation of the States of Indiana and Illinois, the consolidation of certain Indiana railway corporations with a certain railway corporation of the State of Illinois, pursuant to the laws of such states; that the defendants, the Louisville Trust Company, the Ohio Valley Improvement Company (hereinafter called the Contract Company), the Richmond, Nicholasville, Irvine and Beattyville Railway Company (hereinafter called the Beattyville Company), the Louisville Safety Vault and Trust Company, and the natural persons now remaining with them as co-defendants in the suit, are and were at the date of its commencement citizens of states other than the States of Indiana and Illinois.

Appellee prayed to have adjudged void and canceled

the contract with the Contract Company and the guaranty upon certain bonds of the Beattyville Company, and for perpetual injunction to restrain suit thereon upon the ground that appellee's directors had neither statutory power or authority to direct their execution.

(See bill, Tr. 1, and proposed amended bill, Tr. 206.)

The motion for temporary injunction was resisted and heard before Associate Justice Barr and Circuit Judge Jackson, afterwards a member of this court. Upon full argument an injunction was ordered to issue as prayed in the bill.

Thereafter appellee filed its supplemental bill, and defendants or some of them filed demurrers which were heard and overruled by Circuit Judge Lurton and District Judge Barr.

On final hearing Hon. John W. Barr, District Judge, decreed the guaranty void, should be canceled and suit thereon against appellee perpetually enjoined.

On appeal the cause was heard before Taft, Circuit Judge, and Severns and Hammond, District Judges, and decision was delivered June 22, 1896, by the Circuit Judge, reversing the decree holding the contract and guaranty valid (Op. Court of Appeals, Tr., 160), and directing the lower court to dismiss appellee's bill. (Tr., 200.)

Petition for rehearing was duly filed (Tr., 201), and denied without an opinion. (Tr., 219.)

Appellee also moved the Court of Appeals to modify its mandate and thereby allow appellee to file its amended bill in the court below, and with such motion submitted the amended bill proposed (Pet. to modify amended

and supplemental bill, Tr., 204), which motion was overruled without an opinion. (Tr., 219.)

November 9, 1896, appellee on petition moved this court to order by *certiorari* the Court of Appeals to certify to this court the above entitled causes, which was accordingly done, and pursuant thereto the record is before this court for correction of the errors hereinafter assigned.

STATEMENT OF ADMITTED FACTS.—THE STATUTES HERE INVOLVED, THEIR PROVISIONS, THE DATE OF THEIR ENACTMENTS, ETC.

First. The Beattyville Company was created under a special Kentucky act to construct and operate a line of railroad wholly in that state from Versailles to Beattyville. Later the Contract Company was incorporated under a special Kentucky act to construct railways.

Second. October 11, 1888, the Contract Company contracted with the Beattyville Company to construct its road from Versailles to Beattyville, a distance of about ninety miles (its nearest terminus to Louisville being about sixty-five miles), and to take as pay part of its stock and all of its first bonds. (See contract, Tr., p. 16.)

A quorum of appellee's directors, without corporate power or authority, agreed with the Contract Company to guarantee the Beattyville bonds and to receive three-fourths of the Beattyville stock that came to the Contract Company for construction, the terms of which contract and form of guaranty will be noted later.

Third. In 1872 the *old* Louisville, New Albany and Chicago Railway Company (NOT THE APPELLEE) was in-

corporated under Indiana law, with express authority to acquire and operate a railroad from New Albany to Michigan City, all in Indiana. Thereafter that company acquired and operated that line until its consolidation, as hereafter shown.

Fourth. That the State of Kentucky granted to the old New Albany Company permission and license by special act of its legislature, approved April 7, 1880, to acquire terminal facilities in Louisville, and to come to that city from its southern terminus at Albany, Indiana, to transact its interstate business.

That sections 1 and 2 of the Kentucky act under which the Court of Appeals held that appellee's Indiana constituent was created a Kentucky corporation, and thereupon became a corporate citizen of Indiana, are as follows:

Be it enacted by the General Assembly of the commonwealth of Kentucky:

"1. That the Louisville, New Albany and Chicago Railway Company, *a corporation organized under the laws of the State of Indiana*, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations and authority to operate a railroad."

"2. That the Louisville, New Albany and Chicago Railway Company is hereby authorized to purchase or lease for depot purposes in the city of Louisville, or county of Jefferson, such real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machine shops and for all switches, and turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used, or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same, and for

all such purposes shall have the right to condemn all property required for the carrying out of the objects herein named, and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights and franchises."

4. This act shall take effect from and after its passage.

"Approved, April 8, 1880."

That the Old New Albany did acquire certain terminal facilities in the city of Louisville, incidental to its Indiana railroad.

Without provision and authority in *that Act* for stockholders, officers, annual meetings, special meetings, capital stock, amount of its issue, mode for its subscription, and manner of its transfer, no corporate organization could occur thereunder and none was ever attempted.

The stockholders, directors and officers of the Indiana New Albany never acted or assumed to act as the stockholders, directors and officers of the alleged Kentucky corporation, and it had none.

Fifth. The Chicago and Indianapolis Air Line Railway Company (hereafter, called the Air Line) was an Indiana corporation authorized to construct and acquire a railroad wholly in that state from Indianapolis to Dyer; thereafter, the Air Line consolidated with the Chicago and Dyer Railroad Company, an Illinois corporation having full corporate power to build and operate a railroad from Chicago to a point upon the line dividing the States of Indiana and Illinois; that thereafter and of date May 5, 1881, the old New Albany and the company created by consolidation of the Indiana Air Line and the Illinois Dyer, executed by authority of their respective boards articles for consolidation of their managements, roads, stocks and franchises, which articles (see

Tr., 25), recite and contain among other things, the following :

“ This agreement was made this 5th day of May, A. D. 1881, between the Louisville, New Albany and Chicago Railway Company as party of the first part, and the Chicago and Indianapolis Air Line Railway Company, as party of the second part:

Witnesseth: That whereas the party of the first part is a corporation existing under the laws of the State of Indiana, with a share capital of \$3,000,000, and has constructed, owns and operates a line of railroad extending from the city of New Albany, Floyd county, Indiana, to Michigan City, La Porte county, in the same state, and

Whereas, The said party of the second part is a consolidated corporation, *organized and existing under the laws of the States of Indiana and Illinois* with a share capital of \$2,000,000, and has in process of construction a line of railway extending from the city of Indianapolis, Marion county, Indiana, to a connection with a railroad at or near Glenwood, Cook county, Illinois, so as to secure a connection and entrance to the city of Chicago, Illinois, and

Whereas, The lines of railroad so described as aforesaid and belonging respectively to said parties of the first and second parts intersect and connect with each other at Bradford, White county, Indiana, so as to allow the free interchange of traffic between each other, and if joined, united and consolidated, would form a line of railroad connected from the cities of New Albany and Indianapolis, Indiana, to the city of Chicago in the State of Illinois, and

Whereas, The said parties hereto have full power and authority *under the laws of the States of Illinois and Indiana* to consolidate their stocks and properties, * * * etc.

Now, therefore, in consideration of the premises * * * the first and second parties do hereby mutually covenant and agree * * * to unite, merge and consolidate the said two corporations and all their railroads, properties, stock and fran-

chises of every kind so as to create and form a consolidated corporation, to be called and known as the 'Louisville, New Albany & Chicago Railway Company,' on the terms and conditions hereinafter specified."

Article 2 conveys to such consolidated company all the properties and franchises of the Indiana and Illinois constituents.

Article 3 provides that,

"The said consolidated corporation hereby created shall be vested with all the rights, privileges, immunities and franchises which usually pertain to railroad corporations *under the laws of the respective States of Illinois and Indiana*," etc.

Article 4 made the united stocks of the constituents the authorized issue of the consolidated stock and made stockholders of the constituent's stockholders of the consolidated company with the right to exchange constituent for consolidated stock, upon the agreed basis.

Article 7 provided that immediately upon the consummation of the consolidation the board of directors of the first party, the Indiana constituent should constitute the board of directors of the consolidated company until its first election.

(See articles of consolidation, record pp. 25-28.)

Note. At that date there was no law in force in Indiana or Illinois authorizing railroad corporations of those states to guarantee bonds of another corporation in their own or in adjoining states, and the absence of such power was in full legal effect an express prohibition against its exercise."

About a year after appellee was created a corporation by the consolidation of Indiana and Illinois companies, the Kentucky legislature passed an act which appellant

contents vested in the directors the power to authorize the executive officers of appellee (an Illinois and Indiana corporation), to make the guaranty in question, to wit:

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. That the *Louisville, New Albany & Chicago Railway Company* is hereby authorized and empowered to indorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the State of Kentucky, and may consolidate its rights, franchises and privileges with any railway company authorized to construct a railroad from the City of Louisville to any point on the Virginia line, such endorsement, guarantee or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the State of Kentucky; provided it shall not lease or consolidate with any two lines of railway parallel to each other; or it may make such traffic arrangement or agreement with any such before mentioned road as its board of directors may deem proper."

"2. This act shall take effect upon and after its passage."

Approved April 7, 1882.

Sixth. Nearly two years after appellee became an Indiana and Illinois corporation by consolidation, the Indiana legislature passed an act and therein expressly prohibited the guaranty of any railroad bonds in a foreign state by a mere resolution or act of directors or agents, and limited the guaranty to a specified class, said law being approved March 8, 1883, to wit:

Revised Statutes of Indiana: "3,951 a. GUARANTY OF BONDS OF ANOTHER COMPANY.

1. The board of directors of any railroad company organized under and pursuant to the laws of the State

of Indiana, *whose line of railway extends across the state in either direction, may, UPON THE PETITION OF THE HOLDERS OF A MAJORITY OF THE STOCK OF SUCH RAILWAY COMPANY, direct the execution by such railway company of an endorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so endorsing or guaranteeing such bonds.*"

" 3,951 b. PETITION OF STOCKHOLDERS. 2. *The petition of the stockholders specified in the preceding section of this act SHALL STATE THE FACTS relied on to show the benefits accruing to the company endorsing or guaranteeing the bonds above mentioned.*

That the stockholders of (appellee) the Consolidated New Albany Company *never at any time* considered or determined the question of "*benefits*" nor presented a petition to the directors thereof touching said alleged guarantee and *no* recitals appear in said guaranty with respect thereto.

Seventh. The general statute of Indiana from which the Court of Appeals in its opinion quoted Secs. 3949 and 3951, will be considered in argument.

Eighth. The alleged contract with the Contract Company for the guarantee in question contains the provision and recites the form of the guaranty to be endorsed, as follows:

" 4th. The said New Albany Company agrees to and with the said Construction Company that it will, from time to time, as the said first mortgage bonds are earned by and delivered to the said Construction Company pursuant to the terms of their said construction contract,

guarantee the payment by the said Beattyville Company of the principal and interest of the said bonds in manner and form following; that is to say, by endorsing upon each of said bonds a contract of guaranty as follows:

" ' For value received the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond the payment by the obligor thereon, of the principal and interest thereof, in accordance with the tenor thereof. In witness whereof the said Railway Company has caused its corporate name to be signed hereto by its president, and its seal to be attached by its secretary. '

" 6th. In consideration of the premises, the said Construction Company agrees to transfer and deliver to the said New Albany Company three-fourths of the entire capital stock of the said Beattyville Company, the said delivery to proceed *pari passu* with the guaranteeing of the said bonds by the said New Albany Company: \$3,000 at par of the said stock being delivered for each \$4,000 of bonds guaranteed."

The guaranty in the above form was written on 1,185 of said bonds and was signed in the following form:

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,

By W. M. DOWD,

[SEAL.]

President.

ATTEST:

JOHN A. HILTON,

Assistant Secretary.

(See contract, Tr., page 16.)

Ninth. The next day after the guaranty had been written on the last 585 bonds, to wit: on March 12th, the annual meeting of the stockholders of appellee convened for and did elect a new board of directors, and thereupon adjourned to convene March 22, and at such adjourned meeting the new board reported that

at a special meeting of the old board, held in the city of New York, October 9, 1889, only eight of the thirteen old directors were present, and they assumed to pass a resolution authorizing the execution of the aforesaid paper writing and guaranty of the Beattyville bonds thereunder; that such action was so taken by these eight directors without any notice to the other directors or stockholders of appellee; that at that date the eight directors so assuming to act only held and owned in the aggregate some 400 shares of appellee's stock out of 50,000 shares. (See original bill, Rec., 1, and proposed amended bill, Rec., 204.)

That thereupon the stockholders at such adjourned meeting, by resolution and by vote of over 32,000 shares of stock, *repudiated said paper writing and refused to approve the same*; that this was the *first* stockholders' meeting that convened, and the *first* notice these new directors and stockholders had of the attempted execution of this contract and guaranty. And they authorized and directed legal proceedings to be taken, if necessary, to have such unauthorized and illegal contract and attempted guaranty canceled and their enforcement against appellee enjoined; that notice of this repudiation was immediately served upon the Contract Company, and the cancellation of the attempted guaranty demanded; that on the 9th day of April, 1890, eighteen days after such repudiation by appellee's stockholders, it filed its bill for relief against such pretended contract and guaranty as therein prayed.

Tenth. The following facts were admitted and stipulated into the record by appellants:

" That no petition of any of the stockholders of the said company requesting said endorsement in

the manner pointed out in section 3951 A. B. C. of the statutes of Indiana, or in any other manner was ever signed or executed, and no authority was conferred by said stockholders upon such directors, and such directors had *only* such authority as existed by virtue of their existence as such directors.

It is further agreed that the guaranteed bonds referred to, numbered from one to 600 inclusive, were endorsed with such guarantee by the officers of the Louisville, New Albany and Chicago Railway Company on the day of December, 1889; that 585 of such bonds numbered from 601 to 1,185, inclusive, were so endorsed and delivered on the 11th of March, 1890; that the regular meeting of the stockholders of the Louisville, New Albany and Chicago Railway Company convened on the next day, March 12, 1890, and no meeting had been held after the above contract of guarantee had been entered into until such regular meeting was held on the 12th day of March, 1890, and on which day a majority of the board of directors were changed, and such meeting then adjourned to the 22nd day of March, 1890; that at such adjourned meeting the board of directors reported to the stockholders that the before mentioned bonds had been guaranteed, and a resolution was adopted by a majority of all the outstanding stockholders objecting thereto and disclaiming any liability by reason of such guarantee."

(See stipulation tr. 60.)

Eleventh. During the period covered by the foregoing transactions, appellee was not authorized by any Illinois law to purchase the stock or guarantee the debt of any other corporation or enterprise.

Twelfth. Touching the foregoing statutes, and upon final hearing, Judge BARR, among other things, held:

"The decision of Justice Brewer and Judge Jackson, after full consideration, that this court had jurisdiction of this cause and the granting of the injunc-

tion should, we think, settle for this court some of the questions argued by counsel.

This decision determined that the complainant is an Indiana corporation and *not* a Kentucky one; hence, whatever authority the complainant had or has to guarantee the mortgage issued by the Richmond, Nicholasville, Irvine and Beattyville Railroad Company is derived from the corporate powers granted by that state. *It also determined* that upon the then showing the complainant was entitled to an injunction to prevent the disposition by the Ohio Valley Improvement and Contract Company and others of the bonds of the Beattyville Railway Company with the guarantee of the complainants upon them.

* * * * *

The consideration of the guarantee on the coupon bonds of the Beattyville Railway Company was to be the delivery of three-fourths ($\frac{3}{4}$) of the capital stock of that railway company to complainant by the Ohio Valley Contract Company.

The guaranty which was endorsed on \$1,185,000 bonds is as follows " :

(Then follows the words of the guaranty as heretofore shown.)

The court then cited sections 3951-a, b and c, of the Indiana statutes, which is fully quoted with the other statutes here presented. Judge BARR then continued:

" The provisions of the Indiana statute seem to have been ignored and the guaranty made presumably under the supposed authority of an act of the State of Kentucky approved April 7, 1882. *But as complainant is not a Kentucky corporation, this guaranty cannot be sustained or aided by this statute.*

By the Indiana statute quoted * * * *the stockholders, and not the board of directors, are to take the initiative, and a majority thereof determine whether there shall be a guaranty of the bonds of another company. * * * But the authority*

does not exist except by and through the stockholders. The provision of this statute which requires the facts which are relied on to show the benefit accruing to the company endorsing or guaranteeing the bonds, to be stated in the stockholders' petition, clearly shows the authority to guarantee the bonds of another company was not intended to be given the board of directors.

"There is no question here as to the effect of a subsequent approval or ratification of the guaranty of these bonds by the board of directors by the stockholders, *as their action was promptly repudiated* by them the first meeting after the guaranty was made, and, presumably, as soon as it was practical to have had a stockholders' meeting."

The court then refers to other Indiana statutes, and to the provisions thereof stated and quoted in the opinion of the Circuit Court of Appeals, and of them says:

"These powers are such as to consolidate with other railroad companies and to buy and lease by way of extension of their railway lines, other railroads, etc., but the authority to guarantee the bonds of another railroad company is given in express terms in section 3,951, and the mode prescribed, and we think this precludes any implied authority arising to guarantee bonds in cases covered by that section in the exercise of other corporate powers given in other parts of the statute."

Judge BARR then cited and quoted, and thereon held that the guarantee was void as between appellee and the Ohio Valley Contract Company, and as to the rights of defendants as alleged innocent purchasers, said:

"The nature of the contract should have been notice to all purchasers to inquire into the corporate powers of the guaranteeing railway company, *as it was unusual and outside of the ordinary business of a railway company either in operating or constructing railroads.*

Purchasers on the bond market were bound to

know that the president and board of directors of complainant were not the corporation, but its agents, and that the corporate power to guarantee these bonds did *not ordinarily* exist in the directory. There were *no recitals* either in the resolution of the board of directors or in the guaranty itself to mislead the purchaser or stay inquiry. * * *

In speaking of notes and bonds issued or accepted by an agent, acting under a general or special power, the Supreme Court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper *cannot* be used to establish the authority by which it was originally issued.' See *Floyd Acceptances*, 7 Wall., 676, and approved in *Marsh v. Fulton County*, 10 Wall., 683."

The judge then quotes *Merchants Bank v. State Bank*, 10 Wall., and said:

"This language is applicable as in that case where the company had the corporate authority to make the contract and the agent who made it was within the general scope of his duties, though not especially authorized to make the contract in controversy, *but it cannot be true*, broadly stated, else stockholders in corporations would be without the protection of limitations and conditions placed upon their corporation by the charter, *and the state itself* would be without the power to prescribe conditions to the exercise of corporate powers or prescribe the mode or agencies by which corporate powers should be exercised.

* * *

This condition, precedent to the corporate authority of the board of directors, was not performed, or attempted to be performed. * * * We do not therefore, see that the position of these bondholders

who are *bona fide* purchasers without notice is other or different from that of the Ohio Valley Company."

Judge BARR concluded:

"In the case at bar the initiative was to be taken by the stockholders, and they were to determine whether there should be a guaranty, and direct the directors by a petition in writing giving the facts upon which they based their determination. This extraordinary corporate power was to be exercised by the stockholders themselves, and not their agent, the board of directors, and in a way and manner that all who dealt with the corporation could know if they desired. These two cases (*Tappan v. Ry. Co.*, 1st Flippin, 75, and *Zabriskie v. Ry. Co.*, *supra*), both in principle and facts, fall far short of the present case."

In so holding Judge Barr adopted and concurred in the decisions of Associate Justices Brewer and Jackson and Circuit Judge Lurton in overruling the plea to the jurisdiction of the court, in granting the motion for a temporary injunction and in overruling the demurrer to the original bill and supplement, as above stated.

THE CONCLUSIONS REACHED BY THE CIRCUIT COURT OF APPEALS ARE INCONSISTENT AND DIRECTLY IN CONFLICT WITH DECISIONS OF THIS COURT.

Among the holdings of the Circuit Court of Appeals are:

1st. After holding that appellee was not a Kentucky corporation, and that, if it was, it was not as such a party to this suit (op. Rec., p. 167), it held that it was the intention of the Kentucky legislature

"to make that which was an Indiana corporation a corporation of the State of Kentucky" (op. Rec. p. 168),

and as such appellee was authorized by Kentucky law, to make the contract in question.

2d. That the Kentucky act of 1880 created appellee into another corporation in Kentucky, but inasmuch as appellee was the *sole* incorporator named in that act, and was a corporate citizen of Indiana, its corporate citizenship could not be imputed to Kentucky. Therefore appellee, as such Kentucky corporation, must be deemed and taken as a corporate citizen of Indiana; that is, Kentucky by this act created a Kentucky corporation in Indiana with Kentucky powers for exercise (op. Rec. p. 168).

It then held :

(a.) That appellee was not a Kentucky corporation.

(b.) That if there was such Kentucky corporation, it was not a party to this suit.

(c.) That if the Kentucky act did create a corporation, it and the Indiana company were distinct corporations, therefore one could be liable and the other not.

(*Note.* Neither the directors in assuming to authorize the contract or guaranty, or the executive officers in signing the same, purported or assumed to act for or in the name of the Kentucky corporation, which, in fact, had *no* directors, stockholders or officers.)

Yet the Court of Appeals held that the guaranty was, in fact, executed by the Kentucky corporation and also by appellee as a corporation of Indiana and Illinois; and as to forty five bonds, the Court of Appeals ordered that the same be

“stamped under the endorsement of the guaranties the words: ‘This guaranty is binding only on the Louisville, New Albany and Chicago Railway Com-

pany, a corporation of Kentucky. It is not binding on the Louisville, New Albany and Chicago Railway Company, a corporation of Indiana and Illinois.'

"The complainant (appellee) is also entitled to an order enjoining suit on these bonds as a corporation of Indiana and Illinois."

Thus the Court of Appeals held that two corporations executed the guaranty; *first*, the Kentucky corporation, and *second*, appellee as "a corporation of Indiana and Illinois," although appearing to be signed by appellee, *only*, and by the above order released appellee as the latter corporation and held the Kentucky corporation, thus making another and different contract of guaranty.

3d. The Court of Appeals further held: That as to purchasers with knowledge the guaranty was void, *because* the directors had no statutory power to authorize the execution of the guaranty, and could have no authority to direct the same without petition from the stockholders as required in the Indiana act of 1883; but as to purchasers without notice the actual endorsement of the guaranty by such unauthorized direction of the directors bound the stockholders *without* their knowledge or consent, notwithstanding their prompt repudiation of both contract and guaranty. (op. Rec., pp. 179, 166.) Judge Barr found and held that the repudiation was promptly made at the first meeting upon first notice (Tr., 69), and the Court of Appeals concurred therein.

4th. That the Kentucky company passed into the consolidation of the Indiana and Illinois corporation *without* it appearing in the articles of consolidation that such Kentucky company was a party thereto by name or reference, said articles being only executed by the

Louisville, New Albany and Chicago Railway Company as an Indiana corporation.

5th. That where a special power is vested *by express* statute in a designated body for exercise, a purchaser may presume that the same has been exercised by *such* body from the *mere* act of some *other* body, or from the *mere* manual signature of an executive officer of the corporation.

6th. That the *mere* act of the stockholders in electing directors, clothed the directors with the appearance of authority to exercise *special* power in addition to general or usual powers, notwithstanding the legislature vested the exercise of such *special* and *unusual* power exclusively and directly in the stockholders, and counsel for appellant admitted by stipulation (heretofore shown), that "*such directors had ONLY such authority as existed by virtue of their existence as such directors.*"

7th. That notwithstanding the question, as to whether the Beattyville bonds were within the Indiana statute for guaranty, had been expressly committed by the Indiana legislature to the stockholders for decision, persons purchasing the Beattyville bonds with the guaranty endorsed thereon might presume without recitals to that effect that that question had been determined by the stockholders *even* though such bonds were *not* within the Indiana statute.

8th. That the stockholders did promptly determine the question at the first notice and by resolution repudiated the contract of guaranty, which action of the stockholders was wholly disregarded by the Court of Appeals. (Op. Court of Appeals, Tr., 197; Op. Judge Barr, Tr., 69.)

9th. That a statute expressly vesting special power in the stockholders for exercise is a mere regulation between the members, and of the same effect as if written in the by-laws, or resolution of the board. .

10th. That a purchaser may indulge a presumption which becomes a substitute for special statutory authority to an alleged agent, and that this presumption arises in the absence of the receipt of any consideration by the guarantor from the purchaser, and in the absence of recitals or representations sufficient to create or feed an estoppel.

11th. The decision of the Court of Appeals in the above particulars and in other fundamental matters is in vital conflict with the decisions of this court and the rule uniformly applied in the interpretation and construction of statutes, creation of corporations, corporate powers and corporate agencies.

APPELLEE'S ASSIGNMENT OF ERRORS.

The Circuit Court of Appeals erred in holding, to wit:

1. That appellee was a Kentucky corporation.
2. That the guaranty was executed by appellee as a Kentucky corporation and was also executed by appellee as an Indiana corporation.
3. That the alleged Kentucky Company, without stockholders, directors or officers, could or did act touching said contract and guaranty.
4. In adjudicating touching any Kentucky corporation when the same was not a party to the suit.
5. That appellee, an Indiana and Illinois corporation, ever acted through its stockholders, directors or officers as a Kentucky corporation.
6. That appellee as an Indiana and Illinois corporation had corporate power by virtue of the Kentucky acts in question to make the guaranty here involved.
7. That the Beattyville bonds were within the terms of the Indiana statute for guaranty without and before the stockholders considered and decided that the Beattyville road "would be beneficial to the business or traffic of" their Indiana road.
8. That the directors of appellee as an Indiana and Illinois corporation had any authority whatever under the Indiana act of 1883.
9. That appellee's directors had legislative authority to contract for the stock of the Beattyville Company and to assume its bonded debt by guaranty.
10. That appellant had the right to presume from

the mere execution of the guaranty, without recitals, that the directors of appellee as an Indiana and Illinois corporation had requisite legislative authority to direct the execution of the guaranty in question or to presume that the conditions precedent in the Indiana act of 1883, had been performed.

11. That appellee and its Indiana and Illinois stockholders were estopped by such action of the directors and by the mere execution of the guaranty in question.

12. That the Indiana and Illinois stockholders of appellee had no right or power to effectually repudiate and disaffirm said guaranty promptly upon first notice.

13. That the directors of appellee as general agents in the exercise of general corporate power could lawfully direct the execution of such contract and guaranty with the same binding force and effect as in the exercise of the general corporate powers exercised in the transaction of appellee's usual corporate business.

14. That the Indiana act of 1883 in expressly withholding power from the directors to direct the execution of such guaranty without the petition of the stockholders therein expressly required was a mere internal regulation of the corporation equivalent to a by-law or secret resolution.

15. In overruling petition for rehearing and motion to modify mandate to permit filing of amended bill.

16. The decision and judgment of the Circuit Court of Appeals are against the admitted facts and contrary to law and equity.

ARGUMENT.

I.

THE KENTUCKY ACT OF 1880 DID NOT CREATE A CORPORATION. IT WAS NO MORE THAN AN ENABLING ACT OR LICENSE.

Court of Appeals quoted from Kentucky act :

“That the Louisville, New Albany and Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation,” etc., and thereon held:

“It would be difficult to express in concise language any more clearly than is here done, the intention of the legislature to create a new corporation.”

Then follows the sole power granted in the Kentucky act, namely, to acquire terminal facilities in Louisville, which, as hereafter shown, might have been acquired through comity in the absence of any prohibitory legislation in Kentucky.

In *Ry. Co. v. Ry. Co.*, 118 U. S., 295, held :

“And so a corporation of Illinois authorized by its laws to build a railroad across the state from the Mississippi river to its eastern boundary may by permission of the state of Indiana extend its road a few miles within the limits of the latter, or, indeed, through the entire state * * * without thereby becoming a corporation or a citizen of the state of Indiana. The mere grant of privileges or powers to do it as an existing corporation, without more *does not do this*,” etc.

In *N. & C. Co. v. Wooley*, 78 Ky., (p. 525), held :

“Each legislative power must complete the corporation, or it never can be one, because the completing act of one state is not binding upon the state

which began, but failed or refused to complete and give legal existence to the corporation. Otherwise persons who should receive from a state only a part of the powers, but were denied the rest which were necessary to create a corporation, could apply to a foreign state for supplementary legislation which would authorize the building of railroads and bridges upon our soil, and give to its laws an extra territorial force—a doctrine that has always been successfully denied among these states which hold the relation to each other to foreign states in close friendship. The creative power of one state can neither be added to nor subtracted from by another, so as to strengthen or weaken the power of the former in its own territory.”

Here the alleged Kentucky corporation could not act without borrowing Indiana stock, stock-votes, directors, and corporate officers created, and existing under Indiana legislation, their Indiana power to act as such and their Indiana corporate authority to exercise the same.

The holding of the Court of Appeals that that act created a corporation—made an Indiana corporation as sole incorporator, a Kentucky corporation, cannot be sustained upon principle or authority.

All cases cited in the opinion of the Court of Appeals upon that point are relieved of the interpretation and force given by that court, or are directly overruled by *Railway Company v. James*, 161 U. S., 545, which it cited in support of its holding.

That the Court of Appeals misread and misapplied *Railway Company v. James, supra*, and that its holding is in conflict with the decisions of this court, we submit:

First. In this act the Kentucky Legislature expressly dealt with the New Albany Company as “a corporation

organized and existing under the laws of the State of Indiana." (See Sec. 1, Kentucky act of 1880, ante p. .)

The Arkansas statute involved in *Railway Co. v. James*, 161 U. S., 551, provided

"That every railroad corporation of any other state which has heretofore leased or purchased any railroad in this state shall * * * thereupon become a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding," etc.

"* * * and upon the filing" (of certified copies) "of such articles of incorporation or such charter, with a map and profile of the proposed line and paying the fees prescribed by law for railroad charter such railroad company shall, to all intents and purposes, become a railroad corporation of this state, subject to all the laws of the state now * * * in force and hereafter enacted, the same as if formally incorporated in this state, anything in its articles of incorporation or charter to the contrary notwithstanding, etc., and such acts on the part of such corporation shall be conclusive evidence of the intention of such corporation to create and become a domestic corporation."

In that case, the Railway Company complied with the requirements of this statute.

In the construction of that statute this court held:

"It should be observed that in the present case the corporation defendant was not incorporated as such by the State of Arkansas. The legislature of that state was professedly dealing with a railroad corporation of other states."

So here, the Kentucky act did not deal with the personal stockholders or incorporators of the Indiana Company, but with the Indiana corporation itself. It made no provision for stock, stockholders, directors or officers. It was merely an enabling act or license to acquire termi-

nal facilities in the County of Jefferson and City of Louisville.

(See Sec. 2, Kentucky Act, 1880, *ante* p. .)

In *Ry. Co. v. Harris*, 12 Wall., 81, held :

“ The permission was broad and comprehensive in its scope; BUT IT WAS A LICENSE AND NOTHING MORE. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before.”

Why? Because this court, in that case, found and held, that

“ In its name, locality, capital stock, election and power of its officers, and the mode of declaring dividends and doing of its business, its unity was unchanged.”

Second. The Circuit Court of Appeals held:

“ The Kentucky corporation, having been once established, could not die except by its own act or that of the state which gave it being.”

If the New Albany, as *sole* incorporator, became a Kentucky corporation, we have, then, as *sole* incorporator, a corporate creature of Indiana, which might be destroyed by that State by writ of *quo warranto*, or by consolidation with some other Indiana company, thereby submitting to dissolution. *McMahan v. Morrison*, 16 Ind., 172; in *Shields v. Ohio*, 95 U. S., .

In *Railway Co. v. Hendricks*, 40 Ind., 60, Held :

“ It (one of the constituents by consolidation) *ceased to have any officers or agents*; IT CEASED TO BE A SEPARATE LEGAL ENTITY. Instead of two, there was now but one corporation made up of the mingled elements of the two pre-existing companies, so combined and merged that neither could be separately identified or brought into court.

In *Ry. Co. v. Bonney*, 117 Ind., 504, in which appellee's creation by consolidation was involved, held :

"The effect of the statutory consolidation is however, practically to dissolve the old corporations into the new, which takes their place, succeeds to all the property, etc."

Thus the Indiana Company, sole incorporator of the alleged Kentucky Company, and described in the Kentucky act of 1880 as a corporation organized under the laws of the State of Indiana ceased to exist on May 5, 1881, the date of its consolidation with another Indiana and Illinois corporation and thereafter "ceased to have any officers or agents." Therefore on April 8, 1882, the date of the passage of the Kentucky amendment, there was no such corporation with a corporate organization, with stock, stockholders, directors or officers to receive or exercise the alleged corporate powers tendered therein.

Third. The Circuit Court of Appeals held that this court decided (*Ry. Co. v. James*) that the

"Missouri Company might be a corporation of Arkansas by virtue of the statute making it such," etc.

It is clear that that court either overlooked or misinterpreted the following clear and unambiguous language of this court. (p. 564.)

"It is therefore obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas companies did NOT *convert it* into an Arkansas corporation;" that "it would be *necessary* to create it out of *natural* persons whose citizenship of the state creating it could be imputed to the corporation itself."

Fourth. The Court of Appeals further held that,

inasmuch as the *sole* incorporator of the alleged Kentucky company was an Indiana corporation, *no* presumption of its Kentucky citizenship could arise. Therefore, this *Kentucky* corporation was a corporate citizen of *Indiana*. (Op. C. C. A. Tr., p. 168.) If this novel position is maintained, it conclusively follows that, instead of the Kentucky legislature creating a Kentucky corporation, it created an Indiana corporation, and vested it with Kentucky charter powers for exercise. *Such a conclusion is in direct conflict* with every decision of this court involving the creation and citizenship of corporations.

In *Ry. Co. v. Gebhardt*, 109 U. S., 537, held :

"The corporation must reside in the place of its creation, and cannot migrate to another sovereignty (*Bank of Augusta v. Earle*, 13 Pet., 588, although it may do business in all places where its charter allows and local laws do not forbid. (*Railroad v. Koontz*, 104 U. S., 12.) * * *

Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. * * * He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws *with which they are not in entire harmony*.

Parties purchasing Beattyville bonds were bound to look into the charter—articles of consolidation of appellee, and the general railroad laws of Illinois and Indiana which accurately advised them of the exact limitations, within which appellee as a corporation existed and had corporate power for exercise, and that outside of the ownership and operation of railroads in

Indiana and Illinois, and mentioned in such articles, it had *no* corporate existence and therefore *no* power to bind itself either through the action of its directors or by a majority of its stockholders by a guarantee of the bonds of a Kentucky corporation.

This principle, so tersely stated in *Bank v. Earle* and re-affirmed in *Ry. v. Gebhardt*, *supra*, has been repeated and approved in all subsequent decisions of this court involving this question, and was reaffirmed with judicial emphasis in *Railway Company v. James*, *supra*.

Fifth. The authorities cited by the Circuit Court of Appeals refer directly or indirectly to the language of the Supreme Court in *Railway Co. v. Harris*, *supra*, p. 82, that

"the jurisdictional effect of the existence of such corporation as regards the federal courts is the same as that of a copartnership or of individual citizens residing in different states; nor do we see any reason why one state may not make a corporation of another state as there organized and conducted a corporation of its own *quoad hoc* any property within its territorial jurisdiction."

But for what purpose and to what extent is it a corporation *quoad hoc* its property in a foreign state?

This is a question of power and the corporation entitled to its exercise.

In no case cited by the court of appeals in its opinion, or elsewhere, to our knowledge, has any court held that because a corporation in one state held property in another that it could in that state exercise powers not conferred or prohibited by its home charter.

"Besides, it would deprive every state of all control over the extent of corporate franchises proper

to be granted in the state, and corporations would be chartered in one to carry on their operations in another." *Bank v. Earle, supra.*

Clark v. Bernard, 108 U. S., 436, does not sustain the conclusion reached by the court of appeals.

Rhode Island corporate franchises were purchased by the Connecticut Company, and the court was dealing with the Connecticut Company, as an authorized successor to the corporate existence and franchises of a fully equipped Rhode Island corporation.

Likewise in *Railway Co. v. Vance*, 96 U. S., 450, where the Illinois legislature declared the Indiana lessee to be a corporate successor of the Illinois lessor.

Otherwise they are both modified by *Railway Company v. James*.

The quotation from *Railway v. Harris*, was repeated in *Clark v. Bernard*, and in subsequent cases, but in *Nashua Railroad v. Lowell Railroad*, 136 U. S., 356, and in *Railway v. James*, all doubt is removed, and all decisions prior thereto are reconciled or modified, and the doctrine finally and fully announced in *Railway v. James*, that a state cannot create a corporation out of a corporate incorporator of another state; that a state can only incorporate the natural persons who may be the incorporators of a foreign corporation, and thereby create a distinct corporation by its own legislation.

Judge SHIRAS, in delivering the opinion of the court (*Railway v. James*) and in defining the requisite material for incorporators, said:

"In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as construed by the decisions of this court, it would be NECESSARY to create it out of natural

persons, whose citizenship of the state creating it could be imputed to the corporation itself."

(NOTE.—*Bear in mind* that we are not dealing with corporate successors as in *Clark v. Barnard* and *Ry. v. Vance*.)

Upon the rule stated and the principle announced in *Railway Co. v. James*, the Kentucky legislature was powerless to create a corporation of Indiana, or to create one that can only be deemed or taken as a corporate citizen of Indiana, and endow it with Kentucky corporate powers for exercise through Indiana agencies.

Otherwise, instead of the Kentucky legislature creating a Kentucky corporation, it created an Indiana corporation, which must be held subject to the control of Indiana legislation.

"And neither state could confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised." * * *

"It may, indeed, be composed of and represent, under the corporate name, the same natural persons." (*Ry. Co. v. James, supra.*)

Such an incorporation by the Kentucky legislature of natural persons by the same name—the name of the Louisville, New Albany and Chicago Railway Company—is *not before the court*.

Sixth. The Circuit Court of Appeals (Tr., 171) referred to certain acts of appellee in its acquirement of terminal facilities at Louisville and gave force thereto in the construction and interpretation of the Kentucky act.

We submit that parties by conduct or by agreement cannot create a corporation, and that

"no corporation of any state can be made a domestic corporation of another state by simply declaring that it shall be such."

Reece v. Ry. Co., 32 W. Va., 164.

In *Goodlet v. Railway Company*, 122 U. S., 391, the Tennessee act recited:

“An act to incorporate the Louisville and Nashville Railroad Company.”

Several subsequent amendments were severally entitled:

“An act to amend an act entitled an act to charter the Louisville and Nashville Railroad Company,” etc.

After a review in *Goodlet v. L. & N. of Railroad Co. v. Harris*, 12 Wall.; *Railroad Co. v. Vance*, 96 U. S.; *Memphis and Charleston Ry. Co. v. Alabama*, 107 U. S., and *Ry. Co. v. Ry. Co.*, 118 U. S., this court held, p. 405:

“To make such a company a corporation of another state the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creators.”

“*Such allegiance*” could only exist and be maintained through stockholders, directors and officers, *none* of which was authorized or provided for in the Kentucky act or possessed by the alleged Kentucky Company.

This court then disregarded the Tennessee act, approved February 1, 1850, incorporating a company by the corporate name of the Louisville and Nashville Railroad Company, and a further act entitled an act to incorporate the Nashville and Louisville Railway Company, *because* it was not shown that any “organization was effected under those acts.”

Here it does not appear and has not been contended by counsel that any organization was ever attempted under this Kentucky act. The act makes *no* provision for organization and provides no means or authority to

put in form or action the corporate agencies of a Kentucky organization.

Notwithstanding the Kentucky Company, under the Tennessee acts, constructed and put in operation the railroad therein authorized and issued its stock and bonds thereon, this court held, p. 409:

"Looking then, at the body of the Tennessee act of December 4, 1851, we find no language clearly evincing a purpose to create a new corporation, or to adopt one of another State, in such form as to establish the same relations in law between the latter corporation and the State of Tennessee as would exist in the case of one created by that State."

If *so much more* in the Goodlet case failed to constitute the Kentucky, a Tennessee corporation, how can *so much less* in this case be held to constitute this Indiana Company a Kentucky corporation?

Seventh. The old New Albany could have acquired the Louisville terminals without the Kentucky act of 1880. That act gave it no more power than the comity of Kentucky would have extended to it for exercise in the absence of prohibitory legislation.

Christian Union v. Yount, 101 U. S., 352, held:

"In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that a corporation of one state, *not* forbidden by the law of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing," etc.

Cowell v. Springs Company, 100 U. S.,

55.

Railway Co. v. Gebbard, 109 U. S., 536.

II.

Without legislative authority and consent of Indiana, the Indiana, New Albany could not enter into a charter contract with the State of Kentucky, and could exercise no powers in Kentucky which it could not exercise at home."

A charter is a contract between the state and the incorporators. If the Kentucky act incorporated the Indiana corporation, using it as its Indiana incorporator, then the Kentucky charter is a contract between the State of Kentucky and its Indiana corporate incorporator.

In *Railway Company v. James*, *supra*, held:

"It is competent for a railroad corporation organized under the laws of one state, *when authorized so to do by the consent of the state which created it*, to accept authority from another state to extend its railroad into such state, and *to receive a grant of power* to own and control by lease or purchase railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state."

We deny that such Indiana statutory authority existed and respectfully submit that the court of appeals *mis*-interpreted the Indiana statute, as well as the opinion of this court (*James v. Ry.*, *supra*). The court of appeals cited and quoted in its opinion the following clause from section 3,951 of the revised statutes of Indiana:

"May also purchase or contract for use and enjoyment, in whole or in part, of any railroad or railroads, lying within adjoining states; and may assume such of the debts and liabilities of such corporations as may be deemed proper," saying:

"The statutes of Indiana applicable to the company also provided that 'every such railroad corporation

should have capacity to hold, enjoy and exercise, *within* other states, the aforesaid faculties, powers, rights, franchises and immunities, and such others as may be conferred upon it by any law of *this* state in any other state in which any portion of its railroad may be situate or in which it may transact any part of its business;" Revised Statutes of Indiana, 3,949." (See Op. Tr., .)

But observe that the contract in question was not made with the Beattyville Company—did *not* contemplate the acquirement of the Beattyville road by purchase, lease or consolidation. It was simply a contract with the Construction Company to take part of its Beattyville stock, and to guarantee its Beattyville bonds.

The Court of Appeals held:

"We are of opinion that the necessary effect of the act of 1883 was to require that thereafter where a guaranty was deemed a proper means in the exercise of power conferred by section 3951, *it could only be used with the consent of a majority of the stockholders*. Of this view was the Circuit Court, and we concur therein." (See Op. Tr. .)

We submit:

1. That these Indiana statutes did *not* authorize appellee to purchase the stock from the Contract Company and guarantee Beattyville bonds owned by it.

2. That the Indiana statute of 1883 did *not* authorize the purchase of the *stock* of a Kentucky company.

3. That *no* authority can be found in these Indiana statutes authorizing an Indiana railroad company to enter into a charter contract with the State of Kentucky by the reincorporation of its corporate entity in that state, and as shown, no such corporation could be created or could exist without natural persons for incorporators.

Ry. v. Harris and *James v. Ry. Co.*,
supra.

Sections 3945 to 3951, inclusive provide for the incorporation of two distinct classes of railroad corporations with appropriate powers for exercise in the acquirement of title to foreclosed railroads and the maintenance and operation thereof.

1st. For the incorporation of companies under Indiana laws to purchase at a foreclosure sale railroads *wholly* within that State, the same being covered by the foreclosed mortgage.

2d. To purchase at foreclosure sale railroads partly within and partly *without* Indiana, the whole being covered by the foreclosed mortgage.

Appellee's Indiana constituent belonged to the first class, and therefore was not controlled by the statute cited and quoted by the Circuit Court of Appeals.

Section 3945 makes this distinction clear. It provides:

"In case of the sale of any railroad and its property, under or by the authority of any competent court or courts (part of which railroad may be situate within the State of Indiana, and part situate in an adjoining State, and embraced in the mortgage or mortgages or deed or deeds of trust), it may be sold at one time and place, as an entirety," etc.

Section 3947 provides:

"Such corporation shall possess all the powers, rights, privileges, immunities and franchises in respect to said railroad, or the part thereof purchased as aforesaid, and of all the real and personal property appertaining to the same which were possessed or enjoyed by the corporation that owned or held the said railroad, previous to such sale, by virtue of its charter and amendments thereto and other laws of this state or any other state in which any part of said railroad is situated, *not inconsistent with the laws of this state.*"

It would seem incredible that the Indiana legislature

intended by section 3947 as so clearly expressed therein, to prohibit a corporation, upon its organization to purchase at a foreclosure sale, from taking or exercising powers of the foreign railroad mortgagor "*inconsistent*" with its home power, and then intended by implication to authorize it to exercise inconsistent foreign powers under section 3951, *especially* when clearly repugnant to the restrictions expressed therein.

Such a holding would violate every well known rule for the construction and interpretation of statutes.

It is manifest from section 3951 that the additional power therein conferred to purchase a railroad which "in whole or in part" is in an "adjoining state," and to "assume such of the debts and liabilities of said corporation as may be deemed proper," does NOT furnish authority to purchase stock, or to guarantee the debt of a railroad *not* foreclosed, acquired or *purchased*.

An assumption of a debt by the purchaser upon property purchased is a part of the purchase price and becomes the debt of the purchaser.

Again, the same section provides:

"All railroads purchased and branch roads constructed as aforesaid shall be vested in and become a part of the property of the corporation so purchasing or constructing the same as aforesaid, and shall be, in all things, governed by the laws, rules and regulations governing the corporation purchasing or constructing the same as aforesaid, and be operated as part of its line of road."

Thus a company wholly within Indiana that purchases a road, in part or in whole, in an adjoining state remains subject to the laws of Indiana, and operates such road in such adjoining state as a part of its Indiana line.

NO ONE OF THESE SECTIONS EXPRESS OR IMPLY AUTHORITY (a) TO RE-INCORPORATE IN ANOTHER STATE (b) TO ASSUME THE DEBT OF A ROAD IN AN ADJOINING STATE *not* LEASED OR PURCHASED, OR (c) TO CONTRACT FOR THE STOCK OF A FOREIGN COMPANY.

III.

APPELLEE, CREATED BY THE CONSOLIDATION OF ILLINOIS AND INDIANA COMPANIES, COULD NOT BY GENERAL CONTRACT BIND ITSELF IF SUCH CONTRACT WAS NOT AUTHORIZED BY THE STATE OF ONE OF ITS CONSTITUENTS.

The Circuit court of appeals held "that the guaranty was, therefore, a valid obligation of the Kentucky corporation, enforceable against appellee's property in Kentucky."

(Op. Cir. Court of Appeals, Rec. p. 175.)

This guaranty, if valid, creates a general commercial debt. It was not authorized by Illinois statute and was, therefore, prohibited.

Suppose suit was brought in an Illinois court upon a judgment rendered in a Kentucky court upon this guaranty, would such judgment be open to the defense that the guaranty was void under Illinois law? If not, and if the opinion of the court of appeals is sustained, then one state could enforce its legislation upon corporate constituents of consolidated companies in another state, and make courts of such other state powerless to enforce their prohibitory statutes.

We are confident that a doctrine so inconsistent and dangerous will find no support in this court.

State v. Maine Central Ry. Co., 65 Maine, 488, involved this precise question. The court held (p. 497):

"The corporate rights of the new corporation are those derived from its charter—the act of consolidation—under and by virtue of which alone it began to be and is. * * * The corporations comprising it have no further power to control their assets or direct their own movements. The new corporation has its stock, its stockholders, its directors, precisely as if the individuals owning stock had organized to form a corporation. * * * Its corporate life dates from the day of its organization. * * * *The assets of both corporations have become commingled and united.* * * * The corporations out of which it is created cease to exist or exist only for special purposes. * * * (P. 511.) The new corporation would have only the privileges, powers, and immunities which the corporation with the least powers, privileges and immunities possessed *and which were common to them all.*"

Therefore, the Kentucky amendment, even if the New Albany became a Kentucky corporation and as such passed into the consolidation, and the Indiana laws and act of 1883, remained as they were, local and domestic acts.

117 Ind., *supra*.

Shields v. Ohio, 35 U. S., 319.

Railway Co. v. Georgia, 98 U. S., 359.

Clear Water v. Meredith, 1 Wall., 25,

117, Ind., *supra*.

The Court of appeals held, that notwithstanding the Kentucky New Albany and the Illinois and Indiana New Albany were two different corporations, the signature of the last to the guaranty was the signature of both and made the two corporations and their properties in the three States liable, and by express order directed that

appellee, as such consolidated company of Indiana and Illinois, should be released from the guaranty on forty-five of the bonds and that such guaranty should only be held binding against the Kentucky New Albany, and thus by judicial action made another and different contract between the parties than that originally entered into.

In *Railway Co. v. Berry*, 113 U. S., 465, this court held that a consolidation upon like terms and conditions adopted for the creation of appellee made a new corporation, with an existence dating from the date when the consolidation took effect, and therefore privileges conferred upon one of the constituents by statute did not pass to such new company.

If a statutory privilege granted to one of the constituents could not pass to the new company, then a special power granted to such constituent could not.

IV.

THE INDIANA ACT OF 1883, IS EXPRESSLY LIMITED TO SPECIAL CLASSES—EXCLUDING ALL OTHERS.

That act not only created a special power, but specially limited its exercise by the stockholders to special classes in Indiana and in adjoining states:

1st. To Indiana companies whose lines extended across the State. *All* others were excluded from the exercise of this special power.

2d. Bonds for guaranty were limited to the bonds of roads in adjoining State that would in their construction and operation benefit an Indiana road extending across the State.

All bonds of all other roads in adjoining States were EXCLUDED from this statute for guaranty, which exclusion constitutes an express prohibition.

If this act merely required the assent of the stockholders to the contract of guaranty, a different question might arise. It does much more.

It vests exclusive power in the stockholders to *try* and *determine* the vital question, *namely*: whether the Beattyville bonds belonged to the class subject to the guaranty as provided in the act.

Until the Beattyville bonds were brought within this statute by such action by the stockholders, the directors had *no* more statutory authority to direct their guaranty than if such statute had *never been passed*.

This record contains the express judgment of the stockholders, by their repudiation of this contract and guaranty at their first opportunity, that the Beattyville road in its operation would *not* benefit or aid the business or traffic of their company, and therefore the Beattyville bonds were not within the Indiana statute for guaranty.

Every case cited in the opinion of the Court of Appeals in support of this guaranty in favor of alleged *bona fide* purchasers, have been repeatedly distinguished by this court *from the one at bar* upon three grounds:

First, they arose under general powers conferred upon the corporation without restriction, and without limitation as to class or subject.

Second, general powers were expressly vested in the directors for exercise.

Third, in the exercise of such general powers the directors were authorized, either expressly or by implication, to issue negotiable paper to aid in the conduct of the business of the corporate maker, or they contained recitals of due performance of the law sufficient to create and feed an estoppel.

In *Dixon Co. v. Field*, 111 U. S., 83, held:

“ And the estoppel does not arise *except* upon matters of fact which the corporate officers had authority by law to determine and to certify.”

Here, were neither recitals in the guaranty nor “ authority by law ” in the directors or executive officers to determine the vital statutory question which was committed by the legislature to the exclusive judgment of the stockholders.

V.

The court of appeals held that the grant of this exclusive power to the stockholders which was equivalent to an express provision against its exercise by the directors, was a mere internal regulation, therefore equivalent to a by-law or secret resolution.

“ The division of the powers of the corporation may, of course, be varied by the legislature which can, if it please, give more authority to the stockholders and less to the directors, and the constating instrument must therefore in all cases be examined.”

United States v. Dandridge, 12 Wheat.,

113.

Must be examined by whom? Naturally and essentially by all persons dealing with the corporate agents. Bear in mind we are dealing with state grants of power and legislative authority and not with the internal regulations of corporations.

In *Beveridge v. Railway Company*, 112 N. Y., p. 1, held

“ By-laws constitute regulations between the members, but the requirement in the legislation containing the grant of general or special power is a part of the grant, the contract between the state and the

corporation. * * * As agents of the corporation we must find the extent of their (directors') powers by an examination of the laws under which it was created and exists. Those laws in defining the power of the corporation define the scope of the directors' powers to act for it."

Ins. Co. v. Rudell, 103 U. S., 337.

See *Elevated Ry. Co. v. Elevated Ry. Co.*,

11 Daly, 373; expressly approved in

Beveridge v. Ry. Co., *supra*.

Bank v. Dandridge, 12 Wheat., 78.

Twin Lick Oil Co. v. Marbury, 91 U. S., 587.

The Indiana act of 1883 expressly defines and limits the authority of the directors and makes it wholly dependent for existence and exercise upon the petition of the stockholders.

The word directors does not appear in the Kentucky act of 1880.

Even if the Kentucky act of 1882 applied, it expressly and directly vested corporate power in the company by its corporate name and *not* in the directors to guarantee, to consolidate or to lease.

McShane v. Carter, 80 Cal., 312, involved a statute which made the authority of the directors to act dependent upon the action of the stockholders; the court held:

"We think the provision of said act GOES TO THE POWER OR AUTHORITY of the directors."

If the Kentucky act adopted as a part of its alleged incorporation of appellee's Indiana constituent the board of such constituent to represent and exercise this Kentucky corporate authority, then such Indiana directors must be controlled by Indiana and not by Kentucky law, which

would require the petition of the stockholders before special power to guarantee could be exercised.

The public—the purchasers of Beattyville bonds—were bound to take notice of this legislative grant of special power and could indulge no presumptions as substitutes for authority in the directors as special agents to “direct” the execution of the guaranty.

Davis v. Railway Company, 131 Mass., 258.

Spence v. Railway Co., 79 Ala., 585.

Dudley v. Whittier, 46 Ala., 664.

In *Stillman v. Railway Company*, 27 Grat., 119, held:

“If they had not such notice it was their own fault.”

Pierce v. Ry. Co., *supra*.

In *Ernest v. Nichols*, 6 H. L. Cases, p. 418, Lord WENSLEYDALE said:

“But if they do not choose to acquaint themselves with the power of the directors it is their own fault,” etc.

V I.

BENEFITS DO NOT CREATE CORPORATE POWERS.

Otherwise the existence of corporate powers would depend alone upon the judgment of the board as to what it might deem incidental or directly beneficial to the corporation.

The court of appeals held that the consideration for the guaranty here at issue was for the benefit that might come to the traffic and business of appellee as grantor, and thus fell within its general powers.

The contrary was expressly held in *Davis v. Old Colony Ry. Co.*, 131 Mass., 258, and numerous cases therein cited, and in *Pierce v. Railway Co.*, 21 How., 414, in which the court cited *Coleman v. Eastern Counties Ry. Co.*, 10 Bevan, 1, and quoted and approved the language of Lord LANGDALE:

“ But it has been contended that they have a right to pledge without limit the funds of the company for the encouragement of other transactions however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of the kind.”

But here, as shown, the stockholders vested with the exclusive legislative authority to determine that question decided that the construction and operation of the Beattyville road would not benefit the traffic of their company, and thereon promptly repudiated the action of the directors in directing the executive officers to execute the contract and guaranty, and we respectfully insist that the judgment of the stockholders cannot be reversed by the court.

VII.

The general and implied corporate powers of appellee as a consolidated corporation were limited by the articles of consolidation and laws of its creation to the ownership and operation of railroads *wholly* within the States of Indiana and Illinois.

That both general and implied powers are restricted in their exercise to the corporate purposes expressed in the articles or charter, see

Thomas v. Railway Co., 101 U. S., 82.

Oregon Ry. Co. v. Oregon Ry. Co., 130 U. S., 1.

Ins. Co. v. Rundell, 103 U. S., 336.

Pierce v. Railway Co., 21 How., 414.

Ernest v. Nichols, 6 House Lord cases, 418.

Balfour v. Ernest, 94 Eng. C. L., 600.

Ridley v. P. G. & B. Co., 2 Exch., 711.

Railway Co. v. Bowser, 48 Pa. St., 29.

People ex rel., etc., v. Chicago Trust Co., 130 Ill., 268.

Davis v. Old Colony Ry. Co., 131 Mass., 258,

and numerous cases therein cited.

The enumeration of these corporate purposes in these articles of consolidation excluded all implied power not necessary to effectuate them.

See cases *supra*.

VIII.

APPELLEE HAD NO GENERAL POWER TO LEND ITS CREDIT OR GUARANTEE THE DEBTS OF ANY OTHER ENTERPRISE OR COMPANY.

"It is no part of the ordinary business of corporations and a fortiori, still less so of non-commercial corporations to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are ultra vires, whether in the indirect form of going on accommodation bills or otherwise becoming liable for the debts of others."

Lucas, Cashier, etc., v. White Line Transfer Co., 70 Iowa, 549.

See

Morawitz, Section 537.

Davis v. Old Colony Ry. Co., *supra*, and cases cited in opinion.

Coleman v. Ry. Co., 10 Beav., 1.

Ry. Co. v. Ry. Co., 11 C. B., 775.

Pearce v. Ry. Co., 21 How., 443.

IX.

All courts agree that it requires special legislative power to authorize the purchase of the stock or to guaranty the debt of any *other* company or enterprise, and when granted the same remains a special power and does not become one of the general powers of the company to acquire and operate the railroad mentioned in its charter or articles of incorporation.

In *Franklin County v. Bank*, 68 Me., 45, held:

"In the United States corporations *cannot* purchase or hold or deal in the stock of *other* corporations *unless* expressly authorized to do so by law. Green Brice *Ultra Vires*, 95, and note citing a number of authorities. * * * If a corporation can purchase any portion of the capital stock of another corporation, it can purchase the whole, and invest all of its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. * * * *This the law will not allow.*"

This precise question was involved in *People v. Chicago Gas and Trust Company*, 130 Ill., 268.

To the same effect see:

Sumner v. Marcy, 3 W. & M., 105.

Ry. Co. v. Pierce, 21 How., *supra*.

Bank v. Agency Co., 24 Conn. Rep., 159.

Starin v. Town of Genoa, 23 N. Y., 439.

X.

THIS CASE INVOLVES THE LAW OF AGENCY AS WELL AS
QUESTIONS OF CORPORATE POWER

An agent exercising general powers within the limits of expressed or implied corporate powers, might be deemed and taken as the general agent of the company, and as such authorized to transact its *ordinary* business in the *usual* manner, *but* in the exercise of any *special* authority affecting any subject outside of these express corporate powers he must be deemed and taken as a *special* agent, and those dealing with him must take notice that his authority as such *special* agent is not *general* but limited, and *no presumption* will be substituted for actually absent special authority.

Starin v. Town of Genoa, 23 N. Y., 439.

Balfour v. Ernest et al., 94 Eng. C. L., 600.

Pratt v. Short, 79 N. Y., 437.

Ry. Co. v. Iron Co., 44 Ohio St., 44.

Hackensack Water Co. v. DeKay, 46 N. J. Eq., 548.

Martin v. Mfg. Co., 9 N. H., 71.

Morawetz, Secs., 602, 604.

LeMoyne v. Bank, 3 Dill., 44.

Spence v. Ry. Co., 79 Ala., 585.

Ernest v. Nichols, 6 House of Lords, 418.

Chambers v. Railway Co., 5 B. & S., 17.

First. A collateral guaranty is *unusual*, and therefore presumably *unauthorized*. The purchaser therefore is bound to take notice that general corporate agents ordinarily have no power by virtue of their offices as such,

to fasten such liability upon the corporation and no presumptions will protect such guaranty.

The general rule is stated in *Marsh v. Fulton Co.*, 10 Wall., 683.

“ The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper alleged to have been issued under a delegated authority, etc.”

In *Bank v. Bergen*, 115 U. S., 391, held:

“ The delegation must be first established before the doctrine can come in for consideration.”

Second. It would seem well settled that a mere presumption can not create an agent and constitute authority to him to bind the principal without the latter's knowledge or consent. Neither persons, corporations or stockholders can be made principals without their knowledge or act.

Here were neither recitals nor representations of action by the board or by the stockholders. The bonds were bought from the Contract Company, and it received the consideration therefor. Defendants do not claim in their answers that they had any knowledge of the resolution of the board, and under the decision of the Court of Appeals none was needed.

The latest utterance of the Supreme Court on the subject is *Evansville v. Dennett*, 161 U. S., p. 441:

“ The city charter provided that ‘ no stock shall be subscribed or taken by the common council in such company unless it be on the petition of two-thirds of the residents of said city,’ ” etc.

The court, discussing the right of innocent purchasers, said:

“ Was a *bona fide* purchaser of bonds issued in payment of a subscription of stock—the power to

subscribe being clearly given—bound to know that the conditions precedent to the exercise of the power were not performed? If the bonds had not contained any recitals, importing a performance of such conditions before the power to subscribe was exercised, then it would have been open to the City to show, even as against a *bona fide* purchaser that the bonds were issued in disregard of the statute, and therefore did not impose any legal obligation upon it. *Buchanan v. Litchfield*, 102 U. S., 278; *School District v. Stone*, 106 U. S., 183, 187."

Bank v. Turquand, 6 E. & B., 38 (decided May 1, 1856), relied upon with repeated emphasis by counsel for appellant and by the court of appeals in its opinion has *no* application to this case.

In that case the registered deed of settlement of the company and *not the act* of Parliament under which it was incorporated, required the resolution by the shareholders to authorize the execution of the bonds. The company pleaded that without resolution by the shareholders the directors were without authority to direct the execution of the bonds. The plaintiff by replication exhibited a resolution passed by the stockholders authorizing the bonds to be given. The defendant denied the sufficiency of the resolution. The validity of the bond sued on depended upon that issue. The court upon the inspection of the resolution held it was at least sufficient to evidence the action and consent of the shareholders, which entitled plaintiff to judgment. All said by the court thereafter touching presumptions that might arise in the absence of such resolution was unnecessary to the decision of the case. But this was *not* a guaranty of the debt of *another* corporation. It was given in the *usual* course of business. It fell within the general powers. The company received the money, and was therefore

estopped by the resolution, as well as by the receipt of the consideration. *That case differs from the one at bar upon every material point.*

In *Chambers v. Ry. Co.*, 5 B. & S., 117 E. C. L. Rep., 586, *decided* in the Exchequer Chamber eight years *after Bank v. Turquand*, the railway company was authorized to borrow money on certain express conditions. One was that no money for corporate purposes should be borrowed until the whole of the capital of 550,000 pounds should have been subscribed for, etc. In the decision of that case BLACKBURN, J., quoted and approved *Cruteis v. Anchor Ins. Co.*, 2 H. & N., 537, which was an action on an annuity deed executed by three directors of the joint stock company, and in that case

“the court allowed the defendants to plead that the directors making the deed had no power to bind the company, *because* they had no authority to affix the seal to such deed *without* being submitted to a general or special meeting of the shareholders in pursuance of statutes 7 and 8 Vic., Chap. 110.”

“* * * and when I look at the whole scheme of stat. 7 and 8 Vic., chapter 85, etc., especially section 19, together with section 38, etc., which prescribes the mode in which the money is to be raised for the purpose of the undertaking, I come to the conclusion that it appears clearly by reasonable or necessary inference that the legislature have restrained the power of a company to borrow money on mortgage or bonds, *except in the way authorized by the special act.*”

Thus that court did *not* apply the *obiter dicta* in *Bank v. Turquand*.

In *Balfour v. Ernest et al.*, 94 Eng. Com. Law, 600, *decided after Royal British Bank v. Turquand*, the court held that under the broad powers vested in the directors their authority was limited to matters

"in furtherance of the ordinary business of the society," etc., and "not in satisfaction of the liabilities of any other company."

The draft involved in that suit was drawn under the authority of the directors in performance of a contract for the amalgamation of two companies. The court held the contract void and said:

"It is clear, therefore, that this bill was drawn without authority. If that were not so, this consequence would follow, that, although the amalgamation with the other company was illegal and void, *because* THE GENERAL BODY DID NOT ASSENT TO IT, yet the directors, having amalgamated the two companies without authority, might still do all that was necessary to carry out such amalgamation; which would be manifestly absurd."

AGAIN CLEARLY OVERRULING, BY NOT FOLLOWING, *Bank v. Turquand*.

Third. THE PUBLIC IS REQUIRED TO TAKE NOTICE OF THE DIFFERENCE BETWEEN GENERAL AND SPECIAL AGENTS AND THEIR AUTHORITY.

Ins. Co. v. Rundell, 103 U. S., 337.

In *Davis v. Railway Company*, 131 Mass., *supra*, held:

"That the public is bound to take notice of the legal limitations of corporate capacity with the legal distinction between *ordinary* and *extraordinary* powers and of all limitations and restrictions upon the latter."

In *Stillman v. Railway Company*, 27 Grat., 119, touching special powers of corporate agents, and notice thereof, the court said (p. 130):

"The court is, therefore, of opinion that appellants are not innocent purchasers for value and holders of said bonds without notice of the pro-

visions of the act of assembly by which the said company derived their authority to execute a mortgage to secure their payment, etc. *If they had not such notice it was their own fault.* Persons dealing with corporations must take notice of whatever is contained in the law of their organization, and they must be presumed to be informed as to the restrictions and conditions annexed to the grant of power by the law by which the corporation is authorized to act."

"That directors of the corporation are its agents and executive officers"—that the directors do not constitute the corporation, see opinion Judge Van Brunt, 11 Daily, 2 N. Y. Com. Pleas, 437, EXPRESSLY APPROVED in *Beveridge v. Railway Company*, 112 N. Y., 1; *Bank v. Dandridge*, 12 Wheat., 78, and *Twin Lick Oil Co. v. Marbury*, 91 U. S., 587.

Against these decisions and in support of its holding, the Court of Appeals cites *Hoyt v. Thompson Exrs.*, 19 N. Y., 216, which was not followed in *Beveridge v. Ry.*, *supra*.

Judge VAN BRUNT, speaking of *Hoyt v. Thompson*, in *Elevated Ry. Co. v. Elevated Ry. Co.*, *supra*, 11 Daly, 373, said that it, p. 476,

"is also claimed to be an authority against the suggestion made above but upon examination it will be seen that much is said in respect to the relation of directors to their corporation, and the rights and powers and the sources from which they are derived, which was *not at all* necessary to the decision of the question involved," etc.

Judge Van Brunt then quoted from *Hoyt v. Thompson*, the language recited by the Court of Appeals, and said:

"The whole of this argument was devoted to establishing the power of the board of directors to

delegate the authority to manage the ordinary business of the corporation to five of their number, and had no other purpose."

The directors as such corporate agents may exercise a power directly vested in them by the legislature, *without* the intervention of the stockholders, but not so if the power for exercise is directly vested in the corporation or stockholders by special designation.

In *McShane v. Carter*, 80 Cal., *supra*, held:

"Nor can the consent of the stockholders be presumed from the mere fact of the conveyance, whether under corporate seal or not," etc.

In *Ireland v. Turnpike Co.*, 19 Ohio St., 363, held:

"We cannot presume his assent to these proceedings or his acquiescence in them from the mere fact that they took place."

Mechanic's Bank v. Ry. Co., 13 N. Y., 640.

The public—the defendant purchasers of the Beattyville bonds—were bound to take notice of this legislative grant or special power and could indulge no presumptions for authority in the directors as special agents to "direct" the execution of the guaranties here involved.

In *Spence v. Ry. Co.*, 79 Ala., p. 585, held:

"All persons dealing, etc., * * * being bound to inform themselves of the extent of the corporate powers, they must needs examine the act of incorporation which confers the power. *Like* the investigator of a land title they must examine *all the links* in the chain and are charged with knowledge of any fact such examination would disclose."

In *Pearce v. Railway Company*, 21 How., *supra*, Mr. Justice CAMPBELL said:

"Now, persons dealing with the managers of a cor-

poration must take notice of the limitations imposed upon their authority by the act of incorporation."

The court then cites, quotes and approves *McCreggor v. Official Manager of the D. & D. Ry. Co.*, 16 L. Eq., 180.

Coleman v. Eastern Counties Ry. Co., 10 Bevan, 1.

To the same effect see *Dudley v. Whittier*, 46 Ala., 664.

It would seem from the decision of the Court of Appeals that *although* the guaranty does not appear to have been made by or on behalf of the alleged Kentucky New Albany, the purchaser had the right to presume it was executed under the Kentucky amendment; that *although* it does not appear to have been executed by the Indiana New Albany, the purchaser had the right to presume that it was executed under the Indiana domestic act of 1883, and that these presumptions arise *notwithstanding* purchasers were bound to know that the only existing and acting New Albany corporation was the New Albany created by the consolidation of Indiana and Illinois companies, which acted alone and exclusively through Indiana and Illinois stock, stockholders, directors and officers, under Indiana and Illinois law.

Fourth. AGENCY—ESTOPPEL AND THE LEGAL EFFECT OF THE GUARANTY AND THE SCOPE OF THE NOTICE IMPOSED UPON BOND PURCHASERS FURTHER CONSIDERED.

If purchasers may from the manual execution of a guaranty without recitals presume that statutory conditions precedent to an authorized execution had been performed

—that the stockholders had specially authorized the directors to direct such guaranty then no limitation, restriction or qualification the legislature might prescribe could avail.

If this doctrine is sound the result is so startling that some change in the law should be wrought without delay. Judge BARR declared in his opinion that if this were true

“stockholders could not be protected by any limitations or conditions placed upon corporate power and that the sovereign grantor could neither prescribe or restrict the agencies either general or special for its exercise,” etc.

This terse statement of the necessity for the rule applied by Judge Barr and its enforcement, find abundant support in the adjudicated cases, and nowhere more closely stated than by Mr. Justice GRAY, in *Beveridge v. Ry. Co.*, *supra*:

“If it is deemed to be too extensive a power to be vested in the directors and dangerous to the rights of the stockholders in possibility of fraud, it is for the legislature to interfere and prescribe regulations for its exercise.”

The legislature did deem it “too extensive a power to be vested in the directors,” and did regard its exercise by the directors as “dangerous to the rights of the stockholders in the possibility of fraud,” and therefore “the legislature” did “interfere and prescribe regulations,” etc.

If purchasers may presume upon the mere *manual* execution of the guaranty by the executive officers that the stockholders acted when they did not act, then they may equally presume that the directors acted when they did not act, and with equal logic and justice they might in-

dulge the same presumption, although both stockholders and directors had forbidden the execution of the guaranty by such executive officers.

The Court of Appeals fully recognized this principle in holding that the guaranty was endorsed on the bonds *without authority* and was therefore void as to all who had knowledge which eliminates from this case the possible presence of real or actual authority in the directors to direct, or in the executive officers to execute the guaranty.

But the Court of Appeals further held that persons without actual knowledge might presume that the special authority requisite to a valid guaranty was present, from which it conclusively follows that *without* such presumption the guaranty is equally void in the hands of any party.

Where the supposed agent has *no* authority the principal is not bound, because the supposed agency did not exist. To bind the principal therefore, he must have acted, and the action by which he is usually bound in the *absence* of *actual* authority is in clothing in some manner the agent with *apparent* authority, and therefore misleading an innocent purchaser into dealing with him upon the rightful presumption of such authority.

In such case the principal is bound, *not* by virtue of the agent's authority, *but* because the principal so acted as to preclude him from declaring the truth, *namely*, that the agent had no authority in fact.

This is the doctrine of estoppel—*agency by estoppel*.

The Court of Appeals, finding no act of estoppel by the stockholders either in pleadings or proof, substituted the Indiana act of 1883 and predicates the estoppel

thereon by making it, *and not any act of the stockholders*, the basis for the presumption upon which purchasers might depend for validity of the guaranty.

By this act the legislature made the stockholders principals, and authorized them by petition to appoint the directors their agents, with authority from them to "direct" (not to authorize) the execution of the guaranty. Without any act or knowledge by the stockholders, and therefore, without any statutory authority whatever, the directors assumed to authorize the execution of the guaranty, and thereon the Court of Appeals in effect held:

(1.) That this unauthorized act by the directors constituted apparent authority from their principals, the stockholders.

(2.) That the mere manual signing of the guaranty by the executive officers justified defendants in indulging a presumption resting upon the total absence of any act or knowledge of the stockholders.

In *Mercer Co. v. Ins. Co.*, 72 Fed., 623, Judge LURTON cites, and quotes and applies, *Loan Association v. Perry Co.*, 156 U. S., 701:

"Undoubtedly the commercial value of such bonds would be much improved if the mere fact of their issuance should in favor of innocent holders be conclusive evidence of both the authority to issue them and the regularity of the exercise of that power. *This, however, is not the law.*"

(3.) The Court of Appeals in effect further held, that this presumption is not only a sufficient substitute for express authority from the stockholders, but that such presumption, which no act of the stockholders tended to create, estops them from repudiating the attempted guaranty when it first came to their knowledge.

Thus the principal is made liable without his knowledge, and is manacled by an estoppel no act of his tended to create.

These principles and authorities cannot be avoided by the suggestion that the case as here put would constitute forgery, *because* the person acting does not personate the principal, but merely assumes to act as his agent, and in the total absence of authority the assumed agent may be held by the person with whom he deals as principal in the transaction.

In *Bank v. Railway Company*, 3 Kernan, 634. Judge COMSTOCK, in discussing this identical question, said (page 634):

“The fundamental proposition, I repeat, is, that one man can be bound only by the authorized acts of another. He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it. * * * But suppose the power to give the note is on its face conditional. It then has no existence until the condition had been fulfilled. To a confiding dealer who believes that the agent would not do an improper act, the note will certainly carry the appearance of due authority, but if it turns out that the conditions had not occurred on which the exercise of the power depended, then he has trusted to the representation of the agent and I think must look to him alone.”

As held by Judge Comstock, “this special power had no existence until the condition had been fulfilled”—*until* the stockholders had by their action brought the Beattyville bonds within the statute for guaranty.

Judge COMSTOCK further said:

“As the principal never authorized the transaction at all, he is bound neither by the contract nor by the representation. If not by the former, then it is extremely plain he is not by the latter. * *

* But the dealing itself must be authorized. * *
 * If the fraud consists in an over representation of his power to act by which others are drawn into dealing with him, then it is a self-evident proposition that a man can no more enlarge than he can create a power by such a representation."

If the agent cannot enlarge or create a power, how can the power be presumed, or how can the exercise of the power by the principal requisite to create the agency be presumed?

Judge COMSTOCK further held:

"The precise difficulty is that they relied upon the appearance which the agent gave to the act, and by that they were deceived. They were under no deception as to the power in its real or apparent scope. Testing the question by any rule of agency with which I am acquainted the defendant was not bound by the transaction."

Bank v. Aymer, 3 Hill, 262.

So here, the defendants had the right, and it was their duty to see that the directors were acting upon the petition of the stockholders, which constituted the basis and the essential statutory foundation for their authority, and failing to do so, they have no ground for complaint.

In *Mercer Co. v. Ins. Co.*, 72 Fed. 623, Judge LURTON cites, quotes and applies *Loan Association v. Perry Co.*, 156 U. S., 701:

"Every one dealing with an agent assumes all the risk of lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other."

All the stockholders have done was to become incorporated, and elect directors under the laws of its incorporation.

Does the court mean to force upon stockholders the dilemma to either forbear to take advantage of Indiana law permitting incorporation, or by the mere act of incorporation and election of directors clothe them with an unlimited power of attorney to ignore all laws regulating or restricting their acts notwithstanding the legislature expressly vests the special corporate power it grants in the stockholders for exercise, and makes the petition of the stockholders the sole authority to the directors upon which they may direct the guaranty. If so, then stockholders by merely electing directors clothe them with an apparent authority to disregard the law under which their election occurs. Then how can this court hold that the provision of the Indiana statute requiring the action of stockholders is for their protection?

In *Ernest v. Nichols*, *supra*, Lord WENSLEYDALE said:

"The stipulations of the deed which restrict and regulate their authority, are obligatory on those who deal with the company, and the directors can make no contract so as to bind the whole body of the shareholders for whose protection the rules are made, unless they are strictly complied with. * * * The great body of shareholders for whose protection these limitations of authority are provided, cannot be affected, unless they are complied with."

Fountain v. Railway Co., L. R. Eq., 5,
321.

McShane v. Carter, *supra*, Morawetz, Sec.
602, and cases cited and quoted, *ante*.

In *Lord v. Y. F. G. Co.*, 99 N. Y., 547, the court in speaking of statutory requirements for a two-thirds vote or assent of two-thirds of the stockholders, said that such a provision plainly evinced the purpose and intent to protect the stockholders from improvident or corrupt act by

the officers of the company, and that under the statute which required the assent or authority of the stockholders before mortgaging the franchises such a mortgage without such assent was void.

Beveridge v. Ry. Co., supra.

In *Adams v. Trego*, 35 Mo., p. 66, the question was whether the act by a corporate agent was binding upon the corporate principal. In speaking of the powers conferred and the presumptions contended for by counsel the court held:

"If powers like the present were construed as contended for by the appellee there would be no safety for principals."

It is because the power is special and the purpose unusual that a special grant and delegation of it for exercise was necessary.

XI.

The Court of Appeals in holding that the doctrine of agency is involved, said (p. 26):

"It is to be inferred, therefore, when the principal gives to an agent authority to put in circulation negotiable paper in a certain class of cases, he knows he has given his agent an appearance of authority, etc."

We admit that where a corporation is authorized by its charter, either expressly or by implication, to issue promissory notes for money borrowed or for material to be used in and about the conduct of its corporate business, and the corporation authorizes the proper officers to execute and put out such paper for such uses, and such officers issue the promissory negotiable notes of the company for the accomodation of another, such accommo-

dation notes could pass into the hands of a third party for value with the appearance of having been executed under the real authority for corporate purposes. *But such a case is not before the court.*

Suppose the New Albany Company had issued its negotiable paper instead of this guaranty, on the face of which appeared the words,

"This note is made for the accommodation of the Beattyville Company and to meet one of its obligations."

and defendants had purchased the same, would this court hold that they were innocent purchasers for value without notice?

In equally plain words, the guaranty proclaims its execution for the bonded debt of the Beattyville Company.

Bank v. Bank, 95 U. S., 557, involved a guaranty endorsed upon a note or draft. Mr. Chief Justice WAITE said:

"The very form of the paper itself carried notice to the purchaser of the possibly want of power to make the endorsement and is sufficient to put him on guard."

In *Lemoine v. Bank*, 3 Dill., 44, Judge DILLON held:

"* * * 'For suretyship' it has been well remarked 'is a contract which carries with it a lesion by its very nature.' (*Louisiana, etc., Bank v. Nav. Co.*, 3 La. Ann., 294.) Therefore, when a bank has knowledge that an endorsement of the name of a firm is an accommodation endorsement, it is bound at its peril to ascertain whether all the members of the firm on whom it intends to rely assented to this use of its name. This it can easily do."

Hendrie v. Berkowitz, 37 Cal., 113.

Savings Bank v. Parmlee, 3 Dill., 403.

In *McLellan* against *Detroit File Works*, 56 Mich., 579, the president executed notes of the company to take up notes of indebtedness not its own. In speaking of the plaintiff the court (p. 583) cited *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S., 557. *Perry v. Simpson, etc., Co.*, 37 Conn., 520, and held:

"The general authority to make commercial paper in the name of a corporation is given to be exercised for the benefit and in the business of the corporation, and not for the benefit or in the business of others."

So here, nothing can be implied because the fact of the guaranty itself raised a manifest presumption that it was not made "in the regular course of business" of the guarantor, and was therefore "presumptively *ultra vires*."

The public dealing with Beattyville bonds on which appeared the guaranty was in law bound to take notice:

First. That appellee was created by consolidation and expressly limited to the corporate enterprise and business defined and restricted by its articles of consolidation.

Second. That these articles were limited to Indiana and Illinois constituents, to which no Kentucky corporation was a party, and that the contract between the holders of consolidated stock, with the consolidated company and with the states of Indiana and Illinois was limited and controlled by these articles.

Third. That the consolidation extinguished the constituent companies, and therefore at the date of the Kentucky amendment of 1882, the Indiana incorporator mentioned in the Kentucky act of 1880 had ceased to exist.

Fourth. That neither the legislature of Illinois or

Indiana had power by amendatory legislation to extend such contract to new business without the assent of all the stockholders, parties to such contract.

Fifth. If the Indiana act of 1883 extended to and included appellee as an Indiana and Illinois corporation, then proposed purchasers were bound to know the conditions and requirements of that act, *namely*, that it conferred no power upon the directors to direct the guaranty; that the authority of the directors depended exclusively upon the petition of these stockholders, *without* which the directors were not agents under this Indiana act, and were *without* any apparent authority whatever to exercise such *special* power.

As SHOWN the bond market was not only bound to know these things, but was impressed with knowledge and notice of the law as declared by the courts of this country, touching the rightful construction to be given to corporations so created and limitations and restrictions placed upon special statutory authority and special agents.

In *Lowell v. Inhabitants*, 8 Allen, 109, in speaking of the duty of a party dealing with a corporation to inquire as to the power of the agent, etc., the court said:

“The liability of the principal certainly cannot be made to turn on the ease or difficulty with which the continuance or termination of the authority can be ascertained. Such a doctrine would create a new head in the law of agency. * * * Whoever deals with the agent must at his peril ascertain whether the agent has any authority in fact, and if he has, whether the act or deal is within its scope. If this can be ascertained there will be no risk incurred; if it can *not* be ascertained the *sure* protection will be to refrain from dealing with the agent at all.”

Morawetz states the rule at section 606:

"A party dealing with an agent is not entitled to assume the existence of any extraordinary state of facts in order to bring the acts of the agent within the scope of his apparent authority. Hence, if an act performed by an agent of a corporation would be in excess of the company's charter or the agent's authority, *except* under extraordinary circumstances, the company can be held bound by such act *only provided those extraordinary circumstances did exist.*"

In *Hackensack Water Co. v. DeKay*, 36 N. J. Eq., 548, held:

"If the power granted by the charter is subject to a condition, relating either to the form in which the security shall be made in order to be valid, or to some preliminary proceeding extraneous to the acts of the corporation or its officers, securities issued not in the prescribed form, or without the preliminary proceedings had, are subject to defenses in consequence thereof, even in the hands of *bona fide* holders."

The difficulty in this case has arisen from a confusion of *general* and *special* powers and *general* and *special* agents, and upon the theory that *general* authority to exercise general powers constituted an *apparent authority* to exercise special powers touching transactions *outside* of the usual or ordinary corporate business.

XII.

EFFECT OF REPUDIATION.

The legislature having vested in the body of the stockholders the power, judicial in its nature, to decide as to what bonds are guarantiable under the statute, their decision is conclusive, and will not be reviewed by the courts.

Ry. Co. v. Supervisors, 48 N. Y., 93.

Ballinger v. Gray, 51 N. Y., 610.

Mayor v. Davenport, 92 N. Y., 604.

Defendants' equities as alleged *bona fide* purchasers could not determine or cut off the statutory power, authority and right vested in and conferred upon the stockholders to determine against the world the question as to whether the Beattyville road was within the statute for the guaranty of its bonds, and the repudiation by the stockholders constituted such determination.

The Court of Appeals states (Opinion p. 16) as an elementary principle that

"if the power to mortgage the entire assets of a company, etc., does not involve such an organic change in the corporation as to require the assent of the stockholders, it seems manifest that no such change arises from an exercise of the power conferred by statute on a corporation to guarantee the bonds of a connecting company to secure favorable business relations with it."

We had supposed it well settled that the general power of a corporation to mortgage is co-extensive with its power to acquire property, and that such mortgage is given in and about its corporate business, upon its own property, for its own debt, to be used in the conduct of

its exclusive corporate affairs. But how is the court to know that the Beattyville road in its operation would aid the business of the New Albany? *Under* this statute which creates the stockholders the sole tribunal to determine that question, can it be presumed without such action, or can the court determine it from any evidence in the record, or from any that might have been introduced in the absence of its decision by the stockholders themselves? *But* this record contains the express judgment of the stockholders by their repudiation of this contract and guaranty at their first opportunity that the Beattyville road in its operation would not aid or benefit and therefore Beattyville bonds were *not within the Indiana statute for guaranty*. Its decision of the stockholders is not subject to judicial review.

XIII.

BRIEF REVIEW OF SOME OF THE CASES CITED BY THE COURT OF APPEALS.

Every case cited in the opinion of the Court of Appeals, in support of this guaranty or in finding a remedy thereon for the alleged *bona fide* purchasers, can be easily distinguished from the one at bar upon three grounds.

1st. They arose under general powers conferred upon the corporation without restriction and without limitation as to class or subject.

2d. Such express power was expressly vested in the directors for exercise.

3d. In the exercise of such general powers the directors were authorized either expressly or by implication to issue negotiable paper to aid in the conduct of the

business of the corporate maker, *or* they contained recitals of due performance of the law sufficient to create and feed an estoppel.

Zabriskie v. Railway Company, 23 How., 400, does not support the opinion of the Court of Appeals. In that case the guaranty was expressly authorized by statute, which empowered the company

“at any time by means of their subscription to the capital stock of any other company, *or otherwise*, to aid such company in the construction of its railroad for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing such aid.”

Then follows a provision requiring authority by two-thirds vote of the stockholders of each company to make any arrangement authorized by this statute. A stockholders' meeting was held.

The court said, page 401:

“The proxy of the appellant was there, exhibited his instructions, discussed the proposition submitted and declined to vote, when his vote would have controlled the action of the meeting. Since that time several annual meetings have been held at which appellant was represented. * * * These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence. They have circulated without an effort on the part of the corporation or corporators to restrain them, or to disabuse those who were influenced by these apparently official acts.”

No action by the stockholders or grounds for estoppel upon which the court sustained the guaranty in *that* case are shown *here*.

The court cites *Beecher v. Railway Co.*, 45 Mich.,

103. In that case the stockholders' meeting had been held. It was urged it had not been duly called. The court held it was sufficient. Judge COOLEY said:

"The mortgage was never repudiated by the stockholders and they do not now complain of it. What would have been the result if no corporate meeting had been held, we do not decide."

The court cites *Bair v. Railway Company*, 25 Fed., 684, and quotes from Justice Brewer's opinion, that the public was not bound to examine the private books of the corporation. Why? Because it involved title to land. "There," said Mr. Justice BREWER:

"you look to the record title he has, and if it is good you can deal with him on the faith of that in safety, and you are not chargeable with notice of any undisclosed equity."

Neither question of corporate power or agency was involved.

The court cites *Kochler v. Iron Co.*, 2 Black, 715, in support of the proposition that the execution of the guaranty imported authority, but Mr. Justice DAVIS in *that* case said:

"The mere fact that the deed has the corporate seal attached does not make it the act of the corporation unless the seal was placed to it by some one duly authorized," citing in the opinion numerous cases in support of the rule.

In *Thomas v. Horse Ry. Co.*, 104 Ill., 462, cited by the court, the stock of the company was all held and represented by the directors who took action, and it was held, that although technically there was no meeting of the stockholders all was substantially done by the stockholders which the statute required. Here nothing was done by the stockholders.

Bank v. Globe Works, 101 Mass., 57, cited by the court, involved an accommodation negotiable note. It was held valid against the corporate maker upon the ground that it had the general power to issue its own paper in and about its business, and an accommodation note in like form would raise the presumption that it was issued and used for corporate purposes. A guaranty would raise the *contrary* presumption.

Again this general power to execute paper was not hemmed in by express restrictions and limitations.

In *Moran v. Commissioners, &c.*, 2 Black, 722, Miami County issued certain bonds payable to the railroad company, or bearer. In defining the powers of this municipal corporation Mr. Justice WAYNE cited *Zabriskie v. Railway Company*, 23 How., 400, saying that in that case in the construction of a railroad charter held,

"that neither privileges, powers nor authorities could pass unless they are given in unambiguous words, and that an act giving *special* privileges must be strictly construed."

That is, a special power cannot be extended or added to by implication. Nothing is written into it by construction. The court then cited and quoted *Knox v. Aspinwall*, 21 How., 531, and reiterated what was there said, *namely*, that the recitals upon the face of the bond of full performance under the statute authorizing its issue relieved the purchasers from inquiry into further or other evidence of such compliance.

That case was then decided upon the ground of estoppel.

In *Railway Co v. Railway Co.*, 145 U. S., 403, the decision simply was that the stockholders might by their conduct be estopped from repudiating the unauthorized

act of the directors, in making a lease which could not be lawfully made without their consent.

The court said that the petition did not limit the scope of the powers conferred on the corporation

“but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped by lapse of time or otherwise to deny.”

There is no question of waiver, ratification or estoppel by laches or acquiescence in this case, but prompt repudiation followed first notice of the guaranty, and here the power was never vested in the board, *but* was expressly withheld from their exercise.

A satisfactory review of all the authorities cited in the opinion would extend this argument to an inexcusable length.

Respectfully submitted.

G. W. KRETZINGER,
E. C. FIELD and
JAMES S. PIRTLE,

For Appellee.

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LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, Petitioner, *v.* LOUISVILLE TRUST COMPANY.

SAME *v.* LOUISVILLE BANKING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 29, 30. Argued May 4, 5, 1898. — Decided May 15, 1899.

The Circuit Court of the United States for the District of Kentucky has jurisdiction of a suit brought by a corporation, originally created by the State of Indiana, against citizens of Kentucky and of Illinois, even if the plaintiff was afterwards and before the suit made a corporation of Kentucky also, and pending the suit became a corporation of both Indiana and Illinois by reason of consolidation with a corporation of Illinois; but the court cannot, in such a suit, adjudicate upon the rights and liabilities, if any, of the plaintiff as a corporation of Kentucky, or as a corporation of Illinois.

A court of equity has jurisdiction of a bill by a corporation praying that its guaranty on a great number of negotiable bonds may be cancelled, and suits upon it restrained, because of facts not appearing on its face.

Under a statute authorizing the board of directors of a railroad corporation, upon the petition of a majority of its stockholders, to direct the execution by the corporation of a guaranty of negotiable bonds of another corporation, a negotiable guaranty executed by order of the directors, and signed by the president and secretary and under the seal of the first corporation, upon each of such bonds, without the authority or assent of the majority of its stockholders, is void as to a purchaser of such bonds with notice of the want of such authority or assent; but is valid as to a purchaser in good faith and without such notice.

THIS was a bill in equity, filed April 9, 1890, in the Circuit Court of the United States for the District of Kentucky, by the Louisville, New Albany and Chicago Railway Company, (hereafter called the New Albany Company,) described as "a corporation duly organized and existing under the laws of the State of Indiana," against the Ohio Valley Improvement and Contract Company, (hereafter called the construction company,) the Richmond, Nicholasville, Irvine and Beattyville Railway Company, (hereafter called the Beattyville Com-

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pany,) and the Louisville Trust Company, all corporations of the State of Kentucky, and other citizens of Kentucky, of New York and of Illinois, for the cancellation of a contract between the New Albany Company and the construction company, and of a guaranty indorsed by the New Albany Company, in accordance with that contract, upon bonds issued by the Beattyville Company, and held by the other defendants, and for an injunction against suits thereon. The Louisville Banking Company, a corporation of Kentucky, and other bondholders were afterwards made defendants by a supplemental bill.

The bill alleged that the guaranty was fraudulently placed on the bonds of the Beattyville Company by a minority of the plaintiff's directors, who, as individuals, had secured the option to buy the bonds at a low price; and also averred that the guaranty was void, for want of the presence of a quorum of the directors at the meeting which directed it to be executed, as well as for want of a previous petition in writing by a majority of the stockholders, pursuant to a statute of Indiana.

Pleas to the jurisdiction, asserting that the plaintiff was a corporation and a citizen of Kentucky, as well as demurrers to the bill for want of equity, were overruled by the court. 69 Fed. Rep. 431, 432; 57 Fed. Rep. 42.

The case was afterwards heard upon pleadings and proofs, and, so far as is material to be stated, appeared to be as follows:

The New Albany Company, by articles of incorporation, filed with the secretary of state of Indiana in January, 1873, reciting its purchase at a judicial sale at New Albany of the railroad and franchise, and all the property, real and personal, of another railroad company whose line of railroad ran from New Albany to Michigan City in the State of Indiana, and expressed to be made "for the purpose of carrying out the design of the said purchase, and forming a corporation of Indiana," became a corporation, under the statute of Indiana of March 3, 1865, which contained these provisions:

"The said corporation shall have capacity to hold, enjoy and exercise, within other States, the aforesaid faculties, powers, rights, franchises and immunities, and such others as

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may be conferred upon it by any law of this State, or of any other State in which any portion of its railroad may be situate, or in which it may transact any part of its business; and to hold meetings of stockholders and of its board of directors, and to do all corporate acts and things, without this State, as validly and to the same extent as it may do the same within the State, on the line of such road." Indiana Stat. 1865, c. 20, § 5, p. 68; Rev. Stat. § 3949.

"Any railroad company incorporated under the provisions of this act shall have the power and authority to acquire, by purchase or contract, the road, roadbed, real and personal property, rights and franchises, of any other railroad corporation or corporations which may cross or intersect the line of such railroad company, or any part of the same, or the use and enjoyment thereof, in whole or in part; and may also purchase or contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining States; and may assume such of the debts and liabilities of such corporations as may be deemed proper." "Any railroad company incorporated under the provisions of this act shall also have power to consolidate with other railroad corporations in the continuous line, either within or without this State, upon such terms as may be agreed upon by the corporations owning the same." Indiana Stat. 1865, c. 20, § 7, p. 68; Rev. Stat. § 3951.

On April 8, 1880, the legislature of Kentucky passed a statute, entitled "An act to incorporate the New Albany and Chicago Railway Company," which took effect upon its passage, and the first two sections of which were as follows:

"SEC. 1. The Louisville, New Albany and Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations, and authority to operate a railroad.

"SEC. 2. The Louisville, New Albany and Chicago Railway Company is hereby authorized to purchase or lease, for depot purposes in the city of Louisville or county of Jefferson, such

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real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machine shops, and for all switches or turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used, or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same; and for all said purposes shall have the right to condemn all property required for the carrying out of the objects herein named; and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights and franchises."

The third section of that statute directed how proceedings for the condemnation of such real estate should be conducted in the courts of the State of Kentucky. Kentucky Stat. sess. 1879, c. 858, p. 233.

On May 5, 1881, the New Albany Company, (describing itself as "a corporation existing under the laws of the State of Indiana," and as owning and operating a line of railroad from New Albany to Michigan City in the same State,) and the Chicago and Indianapolis Air Line Railway Company, (describing itself as "a consolidated corporation organized and existing under the laws of the States of Indiana and Illinois," and as having in process of construction a line of railway extending from Indianapolis in Indiana to a connection with a railroad at or near Glenwood in Illinois so as to secure a connection with Chicago in that State,) consolidated their stock and property, under the laws of Indiana and of Illinois, "so as to create and form a consolidated corporation, to be called and known as the Louisville, New Albany and Chicago Railway Company," by articles of consolidation, the third of which provided, in accordance with the statutes of Indiana, that "the said consolidated corporation hereby created shall be vested with all the rights, privileges, immunities and franchises which usually pertain to railroad corporations under the laws of the respective States of Illinois and Indiana, wherein the lines of its railroad are situate, and shall also be vested with all and singular the rights, powers, privileges, immunities, capacities and franchises which before the execution

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of these articles were lawfully possessed or exercised by either of the parties hereto;" and the ninth of which provided that "the principal place of business and the general office of the consolidated corporation shall be established in the city of Louisville, Kentucky."

On April 7, 1882, the legislature of Kentucky, by a statute entitled "An act to amend an act entitled 'An act to incorporate the Louisville, New Albany and Chicago Railway,' approved April 8, 1880," enacted that "the Louisville, New Albany and Chicago Railway Company is hereby authorized and empowered to indorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the State of Kentucky; and may consolidate its rights, franchises and privileges with any railway company authorized to construct a railroad from the city of Louisville to any point on the Virginia line; such indorsement, guarantee or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the State of Kentucky: Provided, it shall not lease or consolidate with any two lines of railway parallel to each other." Kentucky Stat. sess. 1881, c. 870, p. 251.

The New Albany Company was not shown to have formally accepted the statutes of Kentucky of 1880 and 1882, or to have ever organized as a corporation under those statutes. But the defendants, as evidence that it had accepted a charter of incorporation from the State of Kentucky, relied on the following documents:

1st. Two deeds to it of lands in Jefferson County, made and recorded in 1881, in which it was described as "of the city of Louisville, Kentucky."

2d. Two mortgages executed by it to trustees in 1884 and 1886, including its railway in Indiana and in Jefferson County, in each of which it was described as "a corporation duly created and existing under the laws of Indiana and Kentucky."

3d. A lease to it from the Louisville Southern Railway

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Company, in 1888, (more fully stated below,) in which it was similarly described.

4th. A petition (the date of which did not appear in the transcript) that an action brought against it in a court of the State of Indiana might be removed into the Circuit Court of the United States, upon the ground that it was a corporation of Kentucky.

5th. Proceedings in 1887, in a court of Jefferson County, for the condemnation of lands in that county upon a petition in which "the Louisville, New Albany and Chicago Railway Company states that it is a corporation, and that it is duly empowered by its charter by an act of the general assembly of the Commonwealth of Kentucky to purchase, lease or condemn in said State such real estate as may be necessary for railway, switches, side tracks, depots, yards and other railway purposes, and to construct and operate a railroad in said State."

On March 8, 1883, the legislature of Indiana passed a statute, entitled "An act to authorize railroad companies organized under the laws of the State of Indiana to indorse and guarantee the bonds of any railroad company organized under the laws of any adjoining State," the material provisions of which were as follows:

"SEC. 1. The board of directors of any railway company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the State in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining State, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

"SEC. 2. The petition of the stockholders, specified in the preceding section of this act, shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

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"SEC. 3. No railway company shall, under the provisions of this act, indorse or guarantee the bonds of any such railway company or companies, as is above mentioned, to an amount exceeding one half of the par value of the stock of the railway company so indorsing or guaranteeing as authorized under this act." Indiana Stat. 1883, c. 127, p. 182; Rev. Stat. §§ 3951a-3951c.

On December 10, 1888, the New Albany Company took a lease, in which it was described as "a corporation organized and existing under the laws of the State of Indiana and of the State of Kentucky," from the Louisville Southern Railroad Company, a corporation of Kentucky, of the railroad of the latter, running from Louisville to Burgin through sundry other places in Kentucky, and connecting at Versailles in that State with a railroad then being constructed by the Beattyville Company to Beattyville, and which would, if completed, extend the connections of the New Albany Company a considerable distance towards the Virginia line.

The Beattyville Company had, on October 11, 1888, made a contract with the Ohio Valley Improvement and Contract Company, by which that company agreed to construct and equip its line of railroad; and, in consideration thereof, the Beattyville Company agreed to execute and issue to the construction company its first mortgage bonds for \$25,000 a mile, dated July 1, 1889, and payable in thirty years, with interest at the annual rate of six per cent; and to transfer to that company the subscriptions received from municipalities, and to issue to that company all its capital stock, except what would have to be issued on account of such subscriptions.

On October 8, 1889, the board of directors of the New Albany Company, as appeared by its records, passed a resolution ordering the president and secretary to execute, under the seal of the company, a contract with the construction company, which contract described that company as a corporation of the State of Kentucky, and the New Albany Company as "a corporation organized and existing under the laws of the States of Indiana and Kentucky," and contained these stipulations:

"Fourth. The said New Albany Company agrees to and

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with the said construction company that it will, from time to time, as the said first mortgage bonds are earned by and delivered to the said construction company pursuant to the terms of their said construction contract, guarantee the payment by the said Beattyville Company of the principal and interest of the said bonds in manner and form following, that is to say, by indorsing upon each of said bonds a contract of guaranty as follows:

“For value received, the Louisville, New Albany and Chicago Railway Company hereby guarantees to the holder of the within bond the payment, by the obligor thereon, of the principal and interest thereof in accordance with the tenor thereof.

“In witness whereof the said railway company has caused its corporate name to be signed hereto by its president and its seal to be attached by its secretary.’”

“Sixth. In consideration of the premises, the said construction company agrees to transfer and deliver to the said New Albany Company three fourths of the entire capital stock of the said Beattyville Company, the said delivery to proceed *pari passu* with the guaranteeing of the said bonds by the said New Albany Company: \$3000 at par of the said stock being delivered for each \$4000 of bonds guaranteed.”

This contract was dated October 9, 1889; was signed in the name of each company by its president and secretary and under its corporate seal; and a copy of it was spread upon the records of the board of directors of the New Albany Company.

The charges of fraud against the directors who took part in that meeting were disproved; and the evidence failed to establish that the meeting was not in every respect a lawful one.

But no petition of a majority of the stockholders for the execution of the guaranty was presented, as required by the statute of Indiana of 1883, above cited. Nor was there any evidence that the stockholders ever authorized or ratified the contract between the New Albany Company and the construction company, or the guaranty executed in accordance therewith.

Pursuant to that contract, and before March 12, 1890, the

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stock of the Beattyville Company was delivered to the New Albany Company; a guaranty, in the terms specified in the fourth article of that contract, and bearing the signature of the New Albany Company by its president and secretary and its corporate seal, was placed on 1185 bonds for \$1000 each of the Beattyville Company; and the bonds thus guaranteed were put on the market by the construction company.

On March 12, 1890, the annual meeting of the stockholders of the New Albany Company was held, a new board of directors was elected, and the meeting was adjourned to March 22, 1890, when it was voted by a majority of the stockholders to reject and disapprove the contract with the construction company, and the guaranty placed on the bonds of the Beattyville Company, as having been made without legal authority or the approval of the stockholders, and to empower the board of directors to take all proceedings necessary or proper to cancel such contract and guaranty, and to relieve the company from any obligation or liability by reason thereof.

Many of the bonds so guaranteed and put on the market, including one hundred and twenty-five bonds purchased by the Louisville Trust Company, and ten bonds purchased by the Louisville Banking Company, were taken from the construction company by the purchasers in good faith, and without notice or knowledge that there had been no petition of a majority of the stockholders for the execution of the guaranty; and forty-five of the bonds were purchased from the construction company by the Louisville Banking Company after the meeting in March, 1890, and with notice that the majority of the stockholders had not petitioned for, but had disapproved, the guaranty.

The Beattyville Company and the construction company went on with the work of constructing the Beattyville railroad until the summer of 1890, when they both became insolvent, and their property passed into the hands of receivers.

The plaintiff, in its bill, tendered back the stock which it had received, and the stock was deposited in the office of the clerk of the court.

The Circuit Court entered a decree for the plaintiff against

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all the defendants. 69 Fed. Rep. 431. The Louisville Trust Company and the Louisville Banking Company and other bondholders appealed to the Circuit Court of Appeals, which reversed the decree of the Circuit Court, and ordered the bill to be dismissed as to the Louisville Trust Company and the Louisville Banking Company, except as to the forty-five bonds held by the latter company; and, as to these bonds, ordered an injunction against suits on the guaranty against the plaintiff as a corporation of Indiana and Illinois, and that there be stamped on each of these forty-five bonds, under its guaranty, these words: "This guaranty is binding only on the Louisville, New Albany and Chicago Railway Company, a corporation of Kentucky. It is not binding on the Louisville, New Albany and Chicago Railway Company, a corporation of Indiana and Illinois." 43 U. S. App. 550. The plaintiff applied for and obtained these writs of certiorari. 164 U. S. 707.

Mr. E. C. Field and *Mr. G. W. Kretzinger* for petitioner.
Mr. James S. Pirtle was on their brief.

Mr. St. John Boyle and *Mr. Swagar Sherley* for the Louisville Trust Company and the Louisville Banking Company.

MR. JUSTICE GRAY, after stating the case as above, delivered the opinion of the court.

The plaintiff, the Louisville, New Albany and Chicago Railway Company, undoubtedly became a corporation of the State of Indiana in 1873 by its incorporation according to the general statute of 1865 of that State.

Whether it afterwards became a corporation of the State of Kentucky also was strongly contested at the bar, and depends upon the legal effect of the statute of Kentucky of 1880.

That statute (being the first statute of Kentucky affecting this corporation) is described indeed in its title, as well as in the title of the statute of 1882 amending it, as "An act to incorporate" this company, although in the title of the first

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statute the word "Louisville" in its name is omitted. By the first words of the enacting part of the statute of 1880, it is "the Louisville, New Albany and Chicago Railway Company, a corporation organized under the laws of the State of Indiana," and not any other corporation, or any association of natural persons, that is "hereby constituted a corporation," with the usual powers of corporations, and with "authority to operate a railroad." And it is the corporation so described that, by the other provisions of that statute, may purchase, lease or condemn real estate required for railroad purposes in the county of Jefferson, and may connect with any other railroad in that county, or build, lease or operate any such connecting line, "and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights and franchises;" and, by the amendatory statute of 1882, may guarantee the bonds of, or consolidate with, other corporations authorized to construct railroads in Kentucky.

This court has often recognized that a corporation of one State may be made a corporation of another State by the legislature of that State, in regard to property and acts within its territorial jurisdiction. *Ohio & Mississippi Railroad Company v. Wheeler*, 1 Black, 286, 297; *Railroad Co. v. Harris*, 12 Wallace, 65, 82; *Railway Co. v. Whitton*, 13 Wall. 270, 283; *Railroad Co. v. Vance*, 96 U. S. 450, 457; *Memphis & Charleston Railroad v. Alabama*, 107 U. S. 581; *Clark v. Barnard*, 108 U. S. 436, 451, 452; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 334; *Graham v. Boston, Hartford & Erie Railroad*, 118 U. S. 161, 169; *Martin v. Baltimore & Ohio Railroad*, 151 U. S. 673, 677. But this court has repeatedly said that, in order to make a corporation, already in existence under the laws of one State, a corporation of another State, "the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this." *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute*

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Railroad, 118 U. S. 290, 296; *Goodlett v. Louisville & Nashville Railroad*, 122 U. S. 391, 405, 408; *St. Louis & San Francisco Railway v. James*, 161 U. S. 545, 561.

The acts done by the Louisville, New Albany and Chicago Railway Company, under the statutes of Kentucky, while affording ample evidence that it had accepted the grants thereby made, can hardly affect the question whether the terms of those statutes were sufficient to make the company a corporation of Kentucky.

But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction, or as to the merits.

As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the State of Indiana, even if it was afterwards created a corporation of the State of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the State by which it was originally created. It could neither have brought suit as a corporation of both States against a corporation or other citizen of either State, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States. *Ohio & Mississippi Railroad v. Wheeler*, 1 Black, 286; *St. Louis & San Francisco Railway v. James*, 161 U. S. 545; *St. Joseph Railroad v. Steele*, 167 U. S. 659, 663; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 106.

In *St. Louis & San Francisco Railway v. James*, the company was organized and incorporated under the laws of the State of Missouri in 1873, and owned a railroad extending from Monett in that State to the boundary line between it and the State of Arkansas. The constitution of the State of Arkansas provided that foreign corporations might be authorized to do business in this State under such limitations and restrictions as might be prescribed by law, but should not have power to appropriate or condemn private property. The legislature of Arkansas, by a statute of 1881, provided that any railroad company incorporated by or under the laws of any other State, and having a line of railroad to the boundary

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of Arkansas, might, for the purpose of continuing its line of railroad into this State, purchase the property, rights and franchises of any railroad company organized under the laws of this State, and thereby acquire the right of eminent domain possessed by that company, and hold, construct, own and operate the railroad so purchased as fully as that company might have done; and that "said foreign railroad company" should be subject to all the provisions of all statutes relating to railroad corporations, including the service of process, and should keep an office in the State. Pursuant to that statute, the St. Louis and San Francisco Railway Company, in 1882, purchased from railroad corporations of Arkansas their railroads, franchises and property, including a railroad connecting at the boundary line with its own railroad, and extending to Fort Smith in Arkansas, and thenceforth owned and operated a continuous line of railroad from Monett in Missouri to Fort Smith in Arkansas. In 1889 the legislature of Arkansas passed another statute, providing that every railroad corporation of any other State, which had purchased a railroad in this State, should, within sixty days from the passage of this act, file a copy of its articles of incorporation or charter with the secretary of state of Arkansas, and should "thereupon become a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding." And the St. Louis and San Francisco Railway Company forthwith filed with the secretary of state of Arkansas a copy of its articles of incorporation under the laws of Missouri, as required by this statute.

In an action brought by a citizen of Missouri against that company in the Circuit Court of the United States for the Western District of Arkansas, to recover for its negligence on that part of its road within the State of Missouri, the company pleaded to the jurisdiction that it was a citizen of Missouri; and the question was certified to this court whether the company, by filing a copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that State, became a corporation and citizen of the State of Arkansas.

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This court, speaking by Mr. Justice Shiras, upon a careful review of the earlier cases, answered that question in the negative.

The fundamental proposition deduced from the previous decisions was thus stated: "There is an indisputable legal presumption that a state corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal courts in 'controversies between citizens of different States.'"

The court frankly recognized that "it is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State, and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State;" and that "such corporations may be treated by each of the States whose legislative grants they accept as domestic corporations." 161 U. S. 562.

But the court went on to say: "The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal courts in such other State as a citizen of the State of its original creation." And after referring to the provisions of the statutes of Arkansas of 1881 and 1889, the court added, "But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation, in such a sense as to make it a citizen of Arkansas, within the meaning of the Federal Constitution, so as to subject it as such to a suit by a citizen of the State of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that Constitution, as construed by the decisions of this court, it would be necessary to create

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it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself." 161 U. S. 562, 565.

In that case, the constitution of Arkansas denied to foreign corporations the right of eminent domain; and the Missouri corporation acquired that right, and owned and operated a railroad in Arkansas, in virtue of statutes authorizing it to purchase the property, rights and franchises of Arkansas corporations, and requiring it to file a copy of its articles of incorporation or charter with the secretary of state of Arkansas, and enacting that it should "thereupon become a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding." Yet it was held that it was not thereby made a corporation of Arkansas, in the sense of the provisions of the Constitution, and of the acts of Congress, conferring jurisdiction on the courts of the United States by reason of diverse citizenship.

The statutes of Arkansas in that case went quite as far, to say the least, towards constituting a corporation of another State a corporation of the State enacting those statutes, as the statutes of Kentucky did in the case at bar.

The consolidation of the Louisville, New Albany and Chicago Railway Company, under the same name, with a railroad company of Illinois in 1881, clearly does not affect the question of jurisdiction. That consolidation appears, by cases cited at the bar, to have been in accordance with the law of Indiana, but not to have been authorized by the law of Illinois. *Louisville, New Albany & Chicago Railway v. Boney*, 117 Indiana, 501; *American Trust Co. v. Minnesota & Northwestern Railroad*, 157 Illinois, 641. It may have been ratified by very recent legislation in Illinois. Illinois Stat. June 9, 1897; Laws of 1897, p. 281; *McAuley v. Columbus, Chicago & Indiana Railway*, 83 Illinois, 348, 352. But jurisdiction of a suit, once acquired by a court of the United States by reason of the requisite citizenship, is not lost by a change in the citizenship of either party pending the suit. *Morgan v. Morgan*, 2 Wheat. 290; *Clarke v. Mathewson*, 12 Pet. 164; *Koenigsberger v. Richmond Co.*, 158 U. S. 41, 49.

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The demurrers to the bill for want of equity were rightly overruled, and were not insisted on in this court. The object of the bill was that the guaranty upon a great number of negotiable bonds, which might otherwise pass into the hands of *bona fide* purchasers, might be cancelled, and suits upon the guaranty restrained, because of facts not appearing upon its face. The relief sought could only be had in a court of equity. *Peirsoll v. Elliott*, 6 Pet. 95, 98; *Grand Chute v. Winegar*, 15 Wall. 373, 376; *Robb v. Vos*, 155 U. S. 13; *Springport v. Teutonia Savings Bank*, 75 N. Y. 397; *Fuller v. Percival*, 126 Mass. 381.

We are then brought to the question of the validity of the guaranty by the Louisville, New Albany and Chicago Railway Company of the bonds of the Beattyville Company, as between the parties before us, and under the circumstances shown by this record.

A railroad corporation, unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires*, unlawful and void, and incapable of being made good by ratification or estoppel. *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, and 171 U. S. 138; *Jacksonville &c. Railway v. Hooper*, 160 U. S. 514, 524; *Union Pacific Railway v. Chicago, Rock Island & Pacific Railway*, 163 U. S. 564, 581; *California Bank v. Kennedy*, 167 U. S. 362, 367, 368; *Davis v. Old Colony Railroad*, 131 Mass. 581; *Humboldt Co. v. Variety Co.*, 22 U. S. App. 334.

The real question in the case is whether this guaranty was valid under the laws of Indiana, the State by which the guarantor was originally created a corporation, and as a corporation of which it brought this suit.

Some reliance was placed upon the statute of Indiana of 1865, authorizing any railroad company incorporated under its provisions, (as the New Albany Company was,) to consolidate with any railroad corporation having a connecting line, either within or without the State, or to acquire, by purchase or

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contract, its property, rights and franchises, or the use and enjoyment thereof, in whole or in part, and to "assume such of the debts and liabilities of such corporations as may be deemed proper." It was argued that the powers thus given embraced the contract by which the New Albany Company agreed with the construction company, in consideration of receiving from it a controlling interest in the stock of the Beattyville Company, to guarantee the bonds of that company.

But the New Albany Company never consolidated itself with the Beattyville Company, or acquired by purchase or contract its property, rights and franchises, or the use or enjoyment thereof, in whole or in part. It is doubtful, to say the least, whether a mere purchase of three fourths of its stock could authorize an assumption of its debts, under the statute of 1865, if that statute had remained in full force. In *Hill v. Nisbet*, 100 Indiana, 341, cited at the bar, a purchase of the stock of one railroad company by another was upheld, not as equivalent to a purchase of the property and franchises, but as a reasonable means to the accomplishment of the consolidation of the two companies.

But we cannot doubt that, as was held by both courts below, the statute of Indiana of 1883 superseded and repealed, as to matters within its scope and terms, the provisions of all former statutes of the State on the subject.

The statute of Indiana of 1883 is entitled "An act to authorize railroad corporations organized under the laws of the State of Indiana to indorse and guarantee the bonds of any railroad company organized under the laws of any adjoining State;" and enacts, in section 1, that "the board of directors of any railway company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the State in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining State, the construction of whose line or lines of railway would be bene-

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ficial to the business or traffic of the railway so indorsing or guaranteeing such bonds." Section 2 provides that such petition of the stockholders shall state the facts relied on to show the benefits accruing to "the company indorsing or guaranteeing the bonds." And section 3 provides that "no railway company shall, under the provisions of this act," indorse or guarantee such bonds to an amount exceeding half the par value of the stock of "the railway company so indorsing or guaranteeing."

The Louisville, New Albany and Chicago Railway Company was a railway company organized under and pursuant to the laws of Indiana, and its line of railway extended across the State from south to north. On October 8, 1889, the board of directors, at a regular meeting, passed a resolution, entered upon its records, authorizing the president and secretary to execute under seal of the company a contract by which the company agreed with a corporation which was constructing the railroad of the Beattyville Company, a railroad corporation of Kentucky, to guarantee the payment by the Beattyville Company of the principal and interest of bonds of that company, by indorsing on each bond a guaranty, executed in like manner, by which "for value received, the Louisville, New Albany and Chicago Railway Company hereby guarantees to the holder of the within bond the payment, by the obligor thereon, of the principal and interest thereof in accordance with the tenor thereof." The contract, as well as the guaranty on many of the bonds, was accordingly executed by the president and secretary and under the seal of the company, and the contract was spread upon the records of the board of directors. No petition of a majority of the stockholders for the execution of the guaranty was ever presented, as required by the statute; there was no evidence that the stockholders ever authorized or ratified the contract or the guaranty; and, at the next annual meeting of the stockholders, in March, 1890, it was voted to reject and disapprove both the contract and the guaranty, as having been made without legal authority or the approval of the stockholders.

Before that meeting was held, one hundred and twenty-five

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of the bonds thus guaranteed had been sold by the construction company to the Louisville Trust Company, and ten bonds to the Louisville Banking Company, each of which companies took those bonds in good faith and without notice that no petition had been presented by a majority of the stockholders for the execution of the guaranty.

Forty-five more of the bonds were purchased by the Louisville Banking Company from the construction company after that meeting, and with notice that a majority of the stockholders had never petitioned for, but had disapproved, the execution of the guaranty. The Louisville Banking Company, thus having notice, when it took these forty-five bonds, that the prerequisite to the execution of the guaranty, under the statute of Indiana of 1883, had not been complied with, was not a *bona fide* holder of these bonds, and should not be allowed to enforce the guaranty thereon against the plaintiff.

The controverted question is whether the bonds which the Louisville Trust Company and the Louisville Banking Company, respectively, purchased in good faith, and without notice of the want of the assent of the majority of the stockholders, are valid in the hands of these companies.

The guaranty by the Louisville, New Albany and Chicago Railway Company of the bonds of the Beattyville Company was not *ultra vires*, in the sense of being outside the corporate powers of the former company; for the statute of 1883 expressly authorized such a company to execute such a guaranty, and its board of directors to direct its execution by the company. The statute, indeed, made it a prerequisite, to the action of the board of directors, that it should be upon the petition of a majority of the stockholders; but this was only a regulation of the mode and the agencies by which the corporation should exercise the power granted to it.

The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court.

It was clearly indicated in two of its earliest judgments on

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the subject of *ultra vires*, both of which were delivered by Mr. Justice Campbell.

In *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441, two railroad corporations of Indiana were held not to have the power to purchase a steamboat to be employed on the Ohio River, to run in connection with their railroads, because this "diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction;" "persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation;" "the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority;" and the contract in question "was a departure from the business" of the railroad corporations, and "their officers exceeded their authority." 21 How. 443, 445.

In *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad*, 23 How. 381, the statutes of Ohio empowered railroad corporations, "by means of their subscription to the capital stock of any other company, or otherwise," to aid it in the construction of its road, for the purpose of forming a connection between the two lines, provided that no such aid should be furnished until two thirds of the stockholders represented and voting, at a meeting called by the directors, should have assented thereto. The directors of three railroad corporations made a contract with another railroad corporation to guarantee its bonds, as part of an arrangement for connecting the four roads; and the bonds were accordingly guaranteed, and were issued to *bona fide* holders, without any meeting of the stockholders having been called. But, upon evidence that the stockholders had subsequently assented to the transaction, the bonds were held to be valid; and the court expressly declared that the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of its organization, does not apply to "those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regula-

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tion which it should not have neglected, but which it has chosen to disregard." 23 How. 398.

Again, in *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, this court, in summing up the result of previous decisions, stated the same distinction as follows: "A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect; the objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it; the contract cannot be ratified by either party, because it could not have been authorized by either; no performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws." 139 U. S. 59.

In *St. Louis, Vandalia & Terre Haute Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393, one of the parties relied on a provision of a statute of Illinois that it should not be lawful for any railroad company of Illinois, or its directors, to consolidate its road with any railroad out of the State, to lease its road to any railroad company out of the State, or to lease any railroad out of the State, "without having first obtained the written consent of all of the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void."

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Of that statute, this court said: "It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny." 145 U. S. 403.

A corporation, though legally considered a person, must perform its corporate duties through natural persons, and is impersonated in and represented by its principal officers, the president and directors, who are not merely its agents, but are, generally speaking, the representatives of the corporation in its dealings with others. Shaw, C. J., in *Burrill v. Nahant Bank*, 2 Met. 163, 166, 167; Comstock, J., in *Hoyt v. Thompson*, 19 N. Y. 207, 216. And the appropriate form of verifying any written obligation to be the act of the corporation is by affixing the signatures of the president and secretary and the corporate seal.

The bonds of the Beattyville Company were instruments negotiable by delivery; and the guaranty indorsed upon each of them by the Louisville, New Albany and Chicago Railway Company was signed by the president and secretary and under its corporate seal, and was in terms payable to the holder thereof and itself negotiable.

One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation.

In *Merchants' Bank v. State Bank*, 10 Wall. 604, this court stated, as an axiomatic principle in the law of corporations, this proposition: "Where a party deals with a corporation in good faith — the transaction is not *ultra vires* — and he is unaware of any defect of authority or other irregularity on the

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part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." 10 Wall. 644, 645. The proposition was supported by citations of many English and American cases, and among them *Royal British Bank v. Turquand*, (1856) 6 El. & Bl. 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal British Bank v. Turquand* as well decided upon its facts. *Knox County v. Aspinwall*, 21 How. 539, 545; *Moran v. Miami County*, 2 Black, 722, 724; *Gelpcke v. Dubuque*, 1 Wall. 175, 203; *St. Joseph v. Rogers*, 16 Wall. 644, 666; *Humboldt v. Long*, 92 U. S. 642, 650. And see *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad*, 23 How. 381, above cited.

Royal British Bank v. Turquand was an action upon a bond signed by two directors, and under the seal of the company, and given for money borrowed by a joint stock company formed under an act of Parliament limiting its powers to the acts authorized by its deed of settlement, and whose deed of settlement provided that the directors might so borrow such sums as should, by a resolution passed at a general meeting of the company, be authorized to be borrowed. The defence was that no such resolution had been passed, and that the bond had been given without the authority of the shareholders. The Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, without passing upon the sufficiency of the resolution in that case, held the company liable on the bond; and, speaking by Chief Justice Jervis, said: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, in reading the deed of settlement, would find, not a prohibition from borrowing, but a

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permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done." 6 El. & Bl. 332.

The decision in *Royal British Bank v. Turquand* has been followed, and Lord Wensleydale's *dicta* to the contrary, a year later, in *Ernest v. Nicholls*, (1857) 6 H. L. Cas. 401, 418, 419, have been disapproved or qualified, in a long line of decisions in England. *Agar v. Athenæum Life Assurance Society*, (1858) 3 C. B. (N. S.) 725, 753, 755; *Prince of Wales Assurance Society v. Harding*, (1858) El. Bl. & El. 183, 221, 222; *In re Athenæum Society*, (1858) 4 K. & J. 549, 560, 561; *Fountaine v. Carmarthen Co.*, (1868) L. R. 5 Eq. 316, 321; *Colonial Bank of Australasia v. Willan*, (1874) L. R. 5 P. C. 417, 448; *Mahony v. East Holyford Co.*, (1875) L. R. 7 H. L. 869, 883, 893, 894, 902; *County of Gloucester Bank v. Rudry Merthyr Co.*, (1895) 1 Ch. 629, 633. The only English decision cited at the bar, which appears to support the opposite conclusion, is *Commercial Bank v. Great Western Railway*, (1865) 3 Moore P. C. (N. S.) 295, which, unless it can be distinguished on its peculiar circumstances, is against the general current of authority. See also a very able judgment of the Court of Errors and Appeals of New Jersey, delivered by Mr. Justice Depue, in *Hackensack Water Co. v. De Kay*, 9 Stewart, (36 N. J. Eq.) 548, 559-567.

In the present case, all natural persons or corporations by whom bonds of the Beattyville Company bearing the guaranty of the Louisville, New Albany and Chicago Railway Company, signed by the proper officers of the company and under its seal, were purchased in good faith, and without notice that there had been no petition of a majority of the stockholders for their execution, had the right to assume that such a petition had been presented, as required by the statute of 1883.

The records of the railroad corporation and of its board of directors, which would naturally show whether such a petition had or had not been filed, were private records, which a pur-

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chaser of the bonds was not obliged to inspect, as he would have been if the fact had been required by law to be entered upon a public record. Brewer, J., in *Blair v. St. Louis, Hannibal & Keokuk Railroad*, 25 Fed. Rep. 684; *Hackensack Water Co. v. De Kay*, 9 Stewart, (36 N. J. Eq.) 548, 568; *McCormick v. Market Bank*, 165 U. S. 538, 551; *Irvine v. Union Bank of Australia*, 2 App. Cas. 366, 379.

It follows that the decree of the Circuit Court of Appeals, so far as it ordered the bill to be dismissed with regard to the guaranty on the bonds which the Louisville Trust Company and the Louisville Banking Company took in good faith, and without notice of any want of authority to execute the guaranty, was correct.

But, in regard to the guaranty on the bonds which the Louisville Banking Company took with notice that the guaranty had not been authorized by a majority of the stockholders, the decree of the Circuit Court of Appeals needs to be modified.

That court, in its opinion and decree, undertook to determine whether the Louisville, New Albany and Chicago Railway Company was liable upon the guaranty as a corporation of Kentucky, and as a corporation of Illinois.

Apart from the question whether it was a corporation of Kentucky, and from the difficulty of treating the negotiable guaranty upon each bond as itself divisible, binding the guarantor as a corporation of one State, and not binding it as a corporation of another State, there is an insurmountable objection to the decree in its present form.

The Louisville, New Albany and Chicago Railway Company is a party to this suit as a corporation of Indiana only, and not as a corporation of Kentucky. It could not, either as a corporation of both States, or as a corporation of Kentucky only, have brought this suit against corporations and citizens of Kentucky, in the Circuit Court of the United States for the District of Kentucky, without ousting the jurisdiction of the court. *Ohio & Mississippi Railroad v. Wheeler*, 1 Black, 286; *St. Louis & San Francisco Railway v. James*, 161 U. S. 545. And citizens of Illinois also being defendants in the bill, it

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is equally impossible to take jurisdiction of the plaintiff as a corporation of Illinois.

It necessarily follows that the rights and liabilities, if any, that it may have as a corporation of Kentucky, or as a corporation of Illinois, cannot be adjudicated in this case; and that the decrees, both of the Circuit Court and of the Circuit Court of Appeals, so far as regards the Louisville Banking Company, must be reversed, and the case remanded to the Circuit Court with directions to dismiss the bill as to the guaranty on the ten bonds of which the Louisville Banking Company was a *bona fide* purchaser, and to enter a decree, as to the guaranty on the forty-five bonds of which it was not a *bona fide* purchaser, that an injunction be issued against bringing suit upon the guaranty on these bonds against the Louisville, New Albany and Chicago Railway Company, a corporation of Indiana, and that there be stamped on these bonds the following word: "This guaranty is not binding on the Louisville, New Albany and Chicago Railway Company, a corporation of Indiana, and is to that extent cancelled, without prejudice to the rights or liabilities, if any, that it may have as a corporation of Kentucky, or as a corporation of Illinois."

Accordingly, in the first case, the decree of the Circuit Court of Appeals is affirmed, and the case remanded to the Circuit Court of the United States with directions to dismiss the bill as against the Louisville Trust Company; and, in the second case, the decrees of both those courts are reversed, and the case remanded to the Circuit Court of the United States with directions to enter a decree in conformity with the opinion of this court.